

1996

## The "Fall" of Summers, The Rise of "Pretext Plus," and the Excalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks

William Corbett

Louisiana State University Law Center, [bill.corbett@law.lsu.edu](mailto:bill.corbett@law.lsu.edu)

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# GEORGIA LAW REVIEW

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VOLUME 30

WINTER 1996

NUMBER 2

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## SYMPOSIUM ARTICLES

### THE "FALL" OF *SUMMERS*, THE RISE OF "PRETEXT PLUS," AND THE ESCALATING SUBORDINATION OF FEDERAL EMPLOYMENT DISCRIMINATION LAW TO EMPLOYMENT AT WILL: LESSONS FROM *MCKENNON* AND *HICKS*

*William R. Corbett\**

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\* Associate Professor of Law, Louisiana State University Law Center; Visiting Associate Professor of Law, College of William and Mary School of Law, Spring 1996; B.S., Auburn University; J.D., The University of Alabama School of Law. An earlier version of this Article was presented prior to the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), at a conference sponsored by the Center for Dispute Resolution at Stetson University College of Law in Clearwater Beach, Florida on January 20, 1995. See William R. Corbett, *Of Power and Lies: At the Intersection of Employment Discrimination and Employment at Will*, in TENTH ANNUAL NATIONAL CONFERENCE ON LABOR AND EMPLOYMENT LAW: CRITICAL ISSUES FOR 1995, at 195 (1995). I thank Professor Gary Vause, the staff of the Stetson University College of Law CLE Department, and the conference speakers and guests, for the opportunity to participate in that conference, to prepare and present the paper, and to benefit from the questions and discussion. I thank my colleagues Glenn G. Morris and John Valery White for helpful discussions. I thank Melissa Morse and Deborah Berthelot for their research assistance. This Article was written with the support of a research grant from the Louisiana State University Law Center.

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*Well they passed a law in '64  
To give those who ain't got a little more.  
But it only goes so far  
Because the law don't change another's mind  
When all it sees at the hiring time  
Is the line on the color bar.*

*That's just the way it is  
Some things will never change  
That's just the way it is  
But don't you believe them.<sup>1</sup>*

## I. INTRODUCTION

A celebration? A vigil? A wake? In 1994, how should one have observed the thirtieth anniversary of the enactment of Title VII of the Civil Rights Act of 1964,<sup>2</sup> the oldest of the federal employment discrimination laws?<sup>3</sup> In the years bracketing the anniversary—1993 and 1995—the United States Supreme Court decided two cases that escalate the ongoing subordination of Title VII and other federal employment discrimination laws to a much older legal doctrine.

On one side are power, property, and prerogative—the ultimate manifestation of which is the legal doctrine known as employment at will. On the other side are the federal statutes and policies prohibiting discrimination in employment based on specified invidious characteristics.<sup>4</sup> The two contending forces have waged

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<sup>1</sup> BRUCE R. HORNSBY, *The Way It Is, on THE WAY IT IS* (RCA Records 1986).

<sup>2</sup> 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993).

<sup>3</sup> See *Major Impact of Title VII Is Cited as Seminar Marks 30-Year Anniversary*, DAILY LAB. REP., June 28, 1994, at C-1 to C-3 (recounting efforts of civil rights litigators in development of EEO movement).

<sup>4</sup> I use "federal employment discrimination law" to refer primarily to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993), § 1981, 42 U.S.C. § 1981 (1988 & Supp. V 1993), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. V 1993). There are, of course, other federal statutes prohibiting employment discrimination, but I am most concerned in this Article with the erosion of the disparate treatment theory as it applies to the foregoing statutes.

war before the Court since 1964.<sup>5</sup> Because employment at will often is referred to by one of its many aliases, such as management prerogatives, it has not always been recognized. In the beginning, one might have predicted that employment at will, a common-law doctrine, would be overmatched when opposing the employment discrimination statutes, which are positive law enacted by Congress, and the strong public policy that is embodied in those statutes.<sup>6</sup> This perception, however, has proven to be wrong. Employment at will now has won so many battles before the Supreme Court that the war may almost be over.<sup>7</sup>

Although some may hold out hope that Congress again will take

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<sup>5</sup> Title VII was originally passed in 1964. Prior to that time, employment at will battled and routed another piece of federal labor law: the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-69 (1988). See *infra* notes 53-67 and accompanying text (discussing subordination of NLRA's statutory rights to employment at will).

<sup>6</sup> See Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 70 (1990) ("At first blush, it seems almost inherently inconsistent to speak of the survival of common-law economic and political premises in light of a statutory scheme which, while stopping short of requiring just cause for discharge, is an undoubted encroachment on the doctrine of employment at will." (footnotes omitted)).

<sup>7</sup> In recent years, several scholars have questioned the continued viability of Title VII as a weapon for combatting employment discrimination and achieving equal opportunity in employment. See, e.g., Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 386 (1995) (arguing Title VII, as interpreted and enforced, is no match in battle for civil rights against forces that have limited employment opportunities of African Americans); see also D. Marvin Jones, *No Time for Trumpets: Title VII, Equality, and the Fin De Siecle*, 92 MICH. L. REV. 2311, 2318 (1994) ("Title VII is the juridical equivalent of the last fading smile of a Cheshire cat of social justice that has long since disappeared."). Professor Rutherglen, in a recent essay, questioned whether the concept of "discrimination" has been stretched so far beyond its commonly understood meaning that prohibitions of discrimination alone no longer can effectively redress the various manifestations of inequality in employment. George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 139-40 (1995).

In a 1991 article, Professors John Donohue and Peter Siegelman described an ongoing battle between two opposing forces that would determine the future of civil rights in employment in the United States. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983 (1991). Donohue and Siegelman identify the United States Congress as the champion of the side favoring expansion of federal power to eliminate discrimination. *Id.* They do not identify a champion of the side working for the "relax[ation] or trim[ming] [of the] federal civil rights law," but they do state that the group looks to the United States Supreme Court to effect that result. *Id.* I suggest that *Hicks* and *McKennon* indicate that the Court has hearkened the pleas of that group and taken on the mantle as its champion. See *infra* notes 183-396 and accompanying text (discussing *Hicks* and *McKennon*).

up the banner of employment discrimination and do battle with the Court, those hopes are probably unfounded. Congress sought to turn back the Court's assault on federal employment discrimination law by passing the Civil Rights Act of 1991,<sup>8</sup> in which Congress attempted to overturn several Supreme Court decisions restricting the federal statutes' protections against discrimination.<sup>9</sup> Despite that response by the legislative branch, the Court has not retreated; instead, in *St. Mary's Honor Center v. Hicks*<sup>10</sup> and *McKennon v. Nashville Banner Publishing Co.*,<sup>11</sup> it redoubled its efforts by launching a frontal assault on the stronghold of employment discrimination law—the disparate treatment theory. Moreover, although past Congresses have championed federal employment discrimination law, the current Congress does not ride under that banner.<sup>12</sup>

In 1993, the Court decided *Hicks*. In that case, the Court refined or redefined (depending on your interpretation of precedent)<sup>13</sup> the analysis developed in *McDonnell Douglas Corp. v. Green*<sup>14</sup> for disparate treatment cases under Title VII. The Court held that a plaintiff is not entitled to judgment as a matter of law if the plaintiff establishes a prima facie case of discrimination and proves that the defendant's articulated reason for the employment action it took against the plaintiff is pretextual.<sup>15</sup>

Then, in January 1995, the Court rendered its long-awaited decision in *McKennon*. In that case, the Court rejected the rule adopted in *Summers v. State Farm Mutual Automobile Insurance*

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<sup>8</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended principally in scattered sections of 42 U.S.C. (Supp. V 1993)).

<sup>9</sup> See H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 1-4 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 694-96 ("[T]he Civil Rights Act of 1991[] has two primary purposes. The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions."). See *infra* notes 173-182 and accompanying text (discussing 1991 Civil Rights Act as response to Court's assault on employment discrimination law).

<sup>10</sup> 113 S. Ct. 2742 (1993).

<sup>11</sup> 115 S. Ct. 879 (1995).

<sup>12</sup> See *infra* note 247 and accompanying text (discussing Congress's failure to overturn *Hicks*).

<sup>13</sup> See *infra* notes 198-201 and accompanying text (comparing majority's interpretation of precedent in *Hicks* with dissent's interpretation).

<sup>14</sup> 411 U.S. 792 (1973).

<sup>15</sup> *Hicks*, 113 S. Ct. at 2749.

Co.<sup>16</sup> regarding after-acquired evidence.<sup>17</sup> Under the *Summers* treatment of after-acquired evidence, such evidence of wrongdoing by an employee, for which the employee would have been fired (or not hired), barred the plaintiff from being awarded any remedy in an employment discrimination action. Although at first blush *McKennon* appears to be a victory for victims of employment discrimination, it is a Pyrrhic victory: the Court in *McKennon* went on to hold that after-acquired evidence can be relevant to limit the remedies available to a plaintiff who proves employment discrimination.<sup>18</sup>

Although *Hicks*, a five-to-four decision, was widely viewed as a devastating defeat for federal employment discrimination law, *McKennon*, a unanimous decision, may not be seen as the defeat that it is.<sup>19</sup> I argue that *McKennon* is cut from the same cloth as *Hicks* and prior cases subordinating employment discrimination law to employment at will. I contend, however, that *McKennon* is, in

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<sup>16</sup> 864 F.2d 700 (10th Cir. 1988).

<sup>17</sup> *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885 (1995).

<sup>18</sup> *Id.* at 886.

<sup>19</sup> See Kenneth R. Davis, *The After-Acquired Evidence Doctrine: A Dubious Defense in Employment Discrimination Cases*, 22 PEPP. L. REV. 365, addendum (1995) (praising both Court's rejection of *Summers* rule and its adoption of date-of-discovery approach to limiting backpay—approach advocated by article); Adria S. Zeldin, *Survey of Recent United States Supreme Court Decisions on Employment Discrimination Law*, 28 CREIGHTON L. REV. 921, 924 (1995) (characterizing Court's decision in *McKennon* as pro-plaintiff); Pamela M. Martey, Note, *"The Last Temptation is The Greatest Treason: To Do the Right Deed for the Wrong Reason": After-Acquired Evidence in Employment Discrimination Claims: McKennon v. Nashville Banner Publishing Co.*, 28 CREIGHTON L. REV. 1031, 1058-60 (1995) (arguing Court's decision upholds policies of federal employment discrimination laws); 1993-94 *Annual Survey of Labor and Employment Law*, 36 B.C. L. REV. 305, 399 (1995) (asserting Court's decision "upholds the legal rights of the employer . . . yet still provides appropriate relief to victims of unlawful discrimination"); see also Samuel A. Mills, Note, *Toward an Equitable After-Acquired Evidence Rule*, 94 COLUM. L. REV. 1525 (1994) (advocating, prior to *McKennon*, adoption of date-of-discovery limitation on backpay). But see Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 165 (1995) (praising Court's rejection of after-acquired evidence as complete defense, but decrying Court's determination that such evidence is relevant to reduction of backpay); George M. Sullivan & Edward J. Harrick, *The Resolution of the After-Acquired Evidence Controversy*, 46 LAB. L.J. 286, 287 (1995) (arguing that although decision "was widely heralded as a resolution favoring employees, closer scrutiny reveals that the decision may actually favor employers"); *Labor Law: Attorney Finds Supreme Court More Pro-Employee Than Appeals Courts*, DAILY LAB. REP., Mar. 16, 1995, at A-2 (discussing comments of AFL-CIO General Counsel Laurence Gold, who, while recognizing positive side of *McKennon* decision for employees, stated "it's not clear who won the war").

several ways, a more insidiously harmful decision for employment discrimination law than is *Hicks* and a more blatant proclamation that employment at will trumps employment discrimination law. Moreover, the *McKennon* Court's cavalier rejection of reinstatement and potential limitation of backpay, the remedies crucial to employment discrimination law's public policy objective, are significant steps in a movement intimately related to the subordination of discrimination law to employment at will: the privatization of employment discrimination law.<sup>20</sup> If the Court continues this campaign, the federal employment discrimination statutes will be reduced to mere statutory tort actions. This characterization renders them even more vulnerable to subordination to the employment-at-will doctrine. The statutes will become just another tort *exception* to employment at will.

Part II of this Article examines the contending forces in this war. It posits that the power of employment at will should not be surprising in view of the doctrine's conquest of an older federal law, the National Labor Relations Act.<sup>21</sup> Part III identifies the genesis of the Supreme Court's subordination of federal employment discrimination law to employment at will and traces the escalation of this campaign from the late 1970s through the enactment of the Civil Rights Act of 1991. Part III next discusses the Court's surprising resumption of its relentless assault on discrimination law after the enactment of the 1991 Act. It juxtaposes the Court's decisions in *Hicks* and *McKennon* and posits that each is part of the ongoing and escalating subordination of federal employment discrimination law to employment at will. Finally, Part IV looks to the future of employment discrimination law and considers ways of preventing the irreversible subjugation of discrimination law to employment at will.

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<sup>20</sup> See Cheryl K. Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 193-202 (1993) (arguing after-acquired evidence arose as part of general recharacterization of Title VII as private tort remedy).

<sup>21</sup> 29 U.S.C. §§ 151-69 (1988).



## II. THE CONTENDING FORCES: THE EMPLOYMENT-AT-WILL DOCTRINE AND FEDERAL EMPLOYMENT DISCRIMINATION LAW

*An antidiscrimination law is the antithesis of freedom of contract, a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all.*<sup>22</sup>

### A. POWER, PROPERTY, AND PREROGATIVE

*"Bill," [said an assistant superintendent] to a foreman [early in the twentieth century], "has anyone been fired from this shop today?" "No," the foreman meekly replied. "Well, then, fire a couple of 'em!" barked the assistant superintendent, in a voice that carried. "It'll put the fear of God in their hearts."*<sup>23</sup>

The classic statement of the employment-at-will doctrine was proclaimed by the Tennessee Supreme Court in 1884:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employe[e]s at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. . . .

. . . .

. . . All may dismiss their employe[e]s at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.<sup>24</sup>

If one believes the recent scholarly writing, employment at will is a once-mighty tyrant in labor and employment law that both is

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<sup>22</sup> RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 3 (1992).

<sup>23</sup> SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945*, at 21 (1985).

<sup>24</sup> *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915).

despised by many and is gradually losing its sovereignty.<sup>25</sup> Indeed, the doctrine does seem to be beset on every side, with both its lineage and pedigree being challenged<sup>26</sup> and “exceptions” to the doctrine being recognized in all jurisdictions with increasing frequency.<sup>27</sup> Among the recognized exceptions are wrongful dis-

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<sup>25</sup> The academic assault on employment at will, and calls for limitations on the doctrine, can be traced back to Professor Lawrence Blades's 1967 article, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). Since the publication of Blades's article, academic criticism of employment at will has proliferated. See, e.g., Theodore J. St. Antoine, *Employment-at-Will—Is the Model Act the Answer?*, 23 STETSON L. REV. 179, 180 n.6 (1993) (citing relevant articles). Professor St. Antoine concludes that the common-law modifications of employment at will are inadequate to protect most employees, and he urges state legislatures to adopt the Model Employment Termination Act approved by the National Conference of Commissioners on Uniform State Laws. *Id. passim*.

The most vocal defender of employment at will in the academic community has been Professor Richard Epstein. See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (discussing role of contract at will in employment relations). Not surprisingly, Epstein also has been one of the harshest critics of employment discrimination law. See generally EPSTEIN, *supra* note 22 (arguing anti-discrimination law interferes with freedom of contract); Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1 (1994) (arguing anti-discrimination law should not apply to private employers in competitive markets); Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 108 HARV. L. REV. 1085 (1995) (criticizing Richard H. McAdams's *Cooperation & Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995), and arguing that only repeal of civil rights laws will achieve key social aim of “minimiz[ing] the level of public force in human affairs”).

For a middle-ground view that employment at will should not be categorically maintained, but neither should a general good cause condition for termination be recognized, see generally Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993) (arguing courts in many cases are applying, and should apply, life-cycle framework to protect both employers and employees from opportunistic behavior).

<sup>26</sup> See, e.g., Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125-27 (1976) (criticizing treatise writer Horace Gay Wood's influential proclamation of employment-at-will rule as not supported by cases Wood cited, as incorrectly stating uniformity of application of rule in United States rather than contrary English rule, and as giving no policy rationale for rule). But see Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood's Rule” Revisited*, 22 ARIZ. ST. L.J. 551, 558 (1990) (arguing Wood “just told it like it was”).

<sup>27</sup> See generally STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* chs. 2-4 (1993) (discussing exceptions to employment at will); Joseph W. Singer, *The Reliance Interest In Property*, 40 STAN. L. REV. 614, 687-89 (1988) (discussing judicially recognized exceptions to employment at will as examples of situations in which law transfers “limited set of property interests from the employer to the employee [to] protect[] the reliance interests of the more vulnerable party”).

charge in violation of public policy,<sup>28</sup> intentional infliction of emotional distress,<sup>29</sup> invasion of privacy,<sup>30</sup> breach of the covenant of good faith and fair dealing,<sup>31</sup> detrimental reliance or promissory estoppel,<sup>32</sup> and implied-in-fact contracts.<sup>33</sup> Although employment at will may be "besieged" by recognition of common-law tort and contract theories of recovery as exceptions to the rule,<sup>34</sup> ironically, the hoary doctrine is on the offensive against federal employment discrimination law, rapidly regaining whatever territory was once taken from it by the federal statutes. Employment at will has shown an uncommon common-law strength when pitted against those laws. What is the source of that strength?

Several theories have been offered to explain the development and adoption of employment at will in the United States.<sup>35</sup> Regardless of the theory to which one subscribes, most scholars

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<sup>28</sup> *E.g.*, *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975).

<sup>29</sup> *E.g.*, *Bustamento v. Tucker*, 607 So. 2d 532 (La. 1992); *Boedwig v. K-Mart, Inc.*, 635 P.2d 657 (Or. Ct. App. 1981).

<sup>30</sup> *E.g.*, *Busby v. Truswal Sys. Corp.*, 551 So. 2d 322 (Ala. 1989); *K-Mart Corp. v. Trotti*, 677 S.W.2d 632 (Tex. Ct. App. 1984).

<sup>31</sup> *E.g.*, *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977).

<sup>32</sup> *E.g.*, *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981).

<sup>33</sup> *E.g.*, *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981).

<sup>34</sup> I used "besieged" to capture the sense of the once impregnable principle being challenged from all sides. Despite the advent of much-ballyhooed exceptions, employment at will remains the default rule. WILLBORN ET AL., *supra* note 27, at 3. Employment at will, while no longer invincible, still reigns over employment law. Professor Moller, surveying the tort and contract incursions on employment at will, concludes that these changes have not effected a major change in the law or a significant shift in the balance of power in the workplace. Sid L. Moller, *The Revolution That Wasn't: On the Business as Usual Aspects of Employment at Will*, 27 U. RICH. L. REV. 441, 494-95 (1993).

<sup>35</sup> For recent scholarship surveying the theories and offering a new theory, see Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment at-Will*, 59 MO. L. REV. 679 (1994). The theories considered and rejected by Professor Morriss include: the rule was a natural product of nineteenth century *laissez faire* capitalism; the rule was a tool with which capitalists exercised control over the new middle class of white collar workers; the rule resulted from less class prejudice and weaker trade unions in the United States than in Britain; and the rule sprang from the widely read work of treatise writer Horace Wood. *Id.* at 681, 683-96. Morriss posits that employment at will was adopted by state courts to serve as a gatekeeper. *Id.* at 753. The courts recognized that they lacked the competence to evaluate the termination decisions of employers; thus, the at-will rule provided an easy solution, quickly disposing of employment cases involving indefinite-term employment. *Id.*

agree that the law's recognition of an employer's virtually unbridled prerogative is based on common-law principles or baselines<sup>36</sup> regarding property ownership and freedom of contract: the workplace is the property of the employer, and in the absence of an agreement to the contrary, the employer may do as it wishes with its property.<sup>37</sup> The employer should be free to use its property without government interference<sup>38</sup> because there is no public

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<sup>36</sup> See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (analyzing common-law baselines of constitutional analysis). Professor Sunstein uses the term "baseline" to refer to the starting points or underlying assumptions that lead to formulation of legal doctrine and rules. *Id.* Several scholars have adopted Sunstein's terminology and approach to examine the baselines for the employment-at-will doctrine. *E.g.*, Jack M. Beermann & Joseph W. Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 914-15 (1989); Blumoff & Lewis, *supra* note 6, at 66; Jones, *supra* note 7, at 2324 n.36.

<sup>37</sup> JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 32-33, 91-94 (1983); Beermann & Singer, *supra* note 36, at 936-56; Blades, *supra* note 25, at 1416-19; Blumoff & Lewis, *supra* note 6, at 66-70; Jones, *supra* note 7, at 2316-17, 2350; Karl E. Klare, *The Public / Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1366-67 (1982); Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 375 (1986); Singer, *supra* note 27, at 633-37. In his defense of employment at will, Professor Epstein argues that it maximizes freedom of contract because it recognizes both "that the employer is the full owner of his capital and [that] the employee is the full owner of his labor." Epstein, *In Defense of the Contract at Will*, *supra* note 25, at 955; see also EPSTEIN, *supra* note 22, at 20-24 (defending the Lockean position of self-ownership). Although Professor Epstein emphasizes the freedom-of-contract rationale in support of employment at will, he clearly recognizes the important property law foundation in employers' common-law prerogatives. See Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1388-89 (1983) (criticizing balancing tests for determining whether employer has violated § 8(a)(1) of National Labor Relations Act by denying access to its property as "cut[ting] back upon the absolute power to exclude that is the hallmark of any system of private property").

In the debate over passage of the Civil Rights Act of 1964, opponents argued that the Act would "infringe[] upon the rights of private property and the rights of American citizens to choose their associates." 110 CONG. REC. 4744 (1964) (statement of Sen. Russell). The Congressional Record is rife with similar statements by opponents of the Civil Rights Act. *E.g.*, *id.* at 4762 ("I am opposed to telling businessmen how they may use their private property and whom they may hire and fire.") (statement of Sen. Hill). See generally Samuel A. Marcossan, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, nn.31-34 (1995) (discussing and quoting from debate over passage of Civil Rights Act of 1964).

<sup>38</sup> Professors Blumoff and Lewis postulate that the Court, as constituted during the "Reagan Revolution," is committed to common-law baselines of neutrality and noninterference. Blumoff & Lewis, *supra* note 6, at 67-70. Blumoff and Lewis, concurring with Sunstein, trace the judicial imprimatur on these principles to *Lochner v. New York*, 198 U.S. 45 (1905). *Id.*; see also Jones, *supra* note 7, at 2354 (arguing that, under traditional prerogatives of employers, "[t]he employer's liberty to be free in his domain of any constraints

interest in the employment relationships between a private employer and its employees.<sup>39</sup>

Professor Klare has identified three types of rights and powers that usually are associated with property ownership: the power to exclude; the right of privacy; and use of the workplace (including the right to manage the work process and to make investment decisions).<sup>40</sup> Thus, the power to terminate for any reason is not the only employer right based on the employer's ownership of the workplace. It is, however, the quintessential expression of employer prerogative,<sup>41</sup> and from the employee's perspective, it is the most important one.<sup>42</sup> The termination power of the employer is part of the power to exclude others from its property.<sup>43</sup> Conversely, exceptions to employment at will infringe on the employer's property right to exclude; thus, they result in a transfer of a part of the employer's property rights to the employee.<sup>44</sup>

Employment at will, steeped as it is in property and contract law principles, has garnered support from economic theorists, who view it as promoting efficiency in several ways.<sup>45</sup> First, economic theorists see the power to exclude others, and the assurance that the government will not intervene to prevent such exclusion, as inducing owners of property to invest and put their resources to

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anchors a notion that in the employer's domain he should be free of the government's intruding gaze").

<sup>39</sup> Linzer, *supra* note 37, at 375; Singer, *supra* note 27, at 633-34. One Senate opponent of passage of the 1964 Civil Rights Act argued that Title VII "would be an unwarranted invasion of private enterprise and private property rights." 110 CONG. REC. 5093 (1964) (statement of Sen. Robertson).

<sup>40</sup> Klare, *supra* note 37, at 1367-71.

<sup>41</sup> *Cf.* Jones, *supra* note 7, at 2343 n.110 ("Of course, the traditional prerogative of the employer was to be free from all constraints on who to hire and fire.").

<sup>42</sup> Termination from employment has been described as "a kind of organizational equivalent of capital punishment." WILBERT E. MOORE, *THE CONDUCT OF THE CORPORATION* 28 (1962).

<sup>43</sup> Singer, *supra* note 27, at 688-89.

<sup>44</sup> *Id.* Professor Singer argues that such a transfer is justified because it protects the reliance interests of the more vulnerable party in the relationship of employment. *Id.* at 688-89; see also Beermann & Singer, *supra* note 36, at 947-56 (discussing property rights as an allocation of rights between parties in relationship, occasionally to protect needs of less powerful party).

<sup>45</sup> *E.g.*, EPSTEIN, *supra* note 22, ch. 8; Epstein, *In Defense of the Contract at Will*, *supra* note 25, at 965-67; Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules & Economic Efficiency*, 38 EMORY L.J. 1097, 1144 (1989).

optimal use.<sup>46</sup> Second, they argue that unlimited managerial discretion gives employees, who are risk averse, incentive to be productive and thus makes workers more productive.<sup>47</sup> Third, employers who abuse the doctrine (that is, act opportunistically) suffer greater reputational losses than employees who act opportunistically; thus, there are informal constraints on an employer's abuse of employment at will.<sup>48</sup> Fourth, employment at will discourages employees from investing too much in a single job and thus encourages them to diversify and make better choices as they obtain more information about employers.<sup>49</sup> Finally, employment at will is inexpensive to administer.<sup>50</sup>

In view of the common-law baselines undergirding employment at will and the efficiency arguments urging resistance to change, employment at will does not appear as feeble as the flurry of exceptions being recognized would lead one to believe. Moreover, an additional factor is likely causing courts to cling to employment at will as the basic principle governing the employment relationship. Courts do not wish to become generally involved in evaluating employers' discharge decisions. Professor Morriss has argued that employment at will originally was adopted by courts in the United States as a gatekeeper rule because courts did not deem themselves competent to evaluate the performance of discharged employees, and he thinks this institutional problem persists today.<sup>51</sup> There is evidence that he is correct: the Supreme Court has admonished courts in employment discrimination cases to avoid second-guessing employers' business practices because of the courts' relative incompetence in that area.<sup>52</sup>

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<sup>46</sup> Beermann & Singer, *supra* note 36, at 925 (discussing management arguments against job security); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356 (1967); Stephen J. Massey, Note, *Justice Rehnquist's Theory of Property*, 93 YALE L.J. 541, 557-58 (1984).

<sup>47</sup> Epstein, *In Defense of the Contract at Will*, *supra* note 25, at 965; Beermann & Singer, *supra* note 36, at 926.

<sup>48</sup> Epstein, *In Defense of the Contract at Will*, *supra* note 25, at 967-68; Beermann & Singer, *supra* note 36, at 926.

<sup>49</sup> Epstein, *In Defense of the Contract at Will*, *supra* note 25, at 968-69; Beermann & Singer, *supra* note 36, at 926-27.

<sup>50</sup> Epstein, *In Defense of the Contract at Will*, *supra* note 25, at 970-73; Beermann & Singer, *supra* note 36, at 927.

<sup>51</sup> Morriss, *supra* note 35, at 713, 752-53, 762-63.

<sup>52</sup> See *infra* notes 136-172 and accompanying text (discussing *Furnco Constr. Corp. v.*

B. SUBORDINATION OF STATUTORY RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT TO EMPLOYERS' COMMON-LAW PREROGATIVES

The Supreme Court's subordination of employment discrimination law to employment at will is developed more fully below.<sup>53</sup> This section, however, concentrates on what a formidable foe employment at will has proven to be for the other federal labor law that threatened its empire. The Supreme Court's subordination of federal labor and employment law to the property-based prerogatives of the employer is forcefully demonstrated by the elevation of the employer's property rights over the rights of employees under the National Labor Relations Act<sup>54</sup> (NLRA).<sup>55</sup> In discussing the common-law exceptions to employment at will,<sup>56</sup> Professor Klare points out that these developments are evidence that the employment relationship is no longer treated as wholly private.<sup>57</sup> Klare notes the "curious twist" that, notwithstanding the recognition that the employment relationship is not entirely private, courts have relied on private-law principles to dilute statutory guarantees under the NLRA.<sup>58</sup>

One of the most controversial issues under the NLRA has been nonemployee union organizers' right of access to an employer's private property to organize employees as part of a union-organizing campaign. In its decision in *Jean Country*,<sup>59</sup> the National Labor Relations Board developed a test that sought to balance the

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Waters, 438 U.S. 567 (1978), and Court's admonition therein and thereafter about judicial incompetence to second-guess employers). Moreover, the gatekeeper rule not only helps courts avoid the types of cases they are ill-equipped to address, but also decreases their overall caseload. There has been an increasing trend in the federal courts to use summary judgment to prune the dockets, and employment discrimination claims have become increasingly susceptible to such judicial action. Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 LAB. LAW. 43, 66-67 (1993).

<sup>53</sup> See *infra* notes 126-396 and accompanying text (discussing Court's subordination of discrimination laws to employment at will).

<sup>54</sup> 29 U.S.C. §§ 151-69 (1988).

<sup>55</sup> ATLESON, *supra* note 37, at 32, 91-94; Klare, *supra* note 37, at 1403-05.

<sup>56</sup> See *supra* notes 28-33 and accompanying text (listing common-law exceptions to employment-at-will doctrine).

<sup>57</sup> Klare, *supra* note 37, at 1362-63.

<sup>58</sup> *Id.* at 1364.

<sup>59</sup> 291 N.L.R.B. 11 (1988).

statutory rights of employees (to learn of organizational opportunities) with the private property rights of the employer.<sup>60</sup> The Supreme Court rejected the Board's test in 1992 in *Lechmere, Inc. v. NLRB*.<sup>61</sup> The majority opinion stressed the property rights of the employer and generally denied access.<sup>62</sup>

The relationship between management prerogatives and statutory rights under the NLRA also is manifested by an employer's right to hire permanent replacements for employees engaged in an economic strike. The Supreme Court recognized this right in *NLRB v. Mackay Radio & Telegraph Co.*<sup>63</sup> Many commentators have argued against the "Mackay doctrine" on the ground that recognition of such a right eviscerates the right to strike guaranteed by section 7 of the NLRA.<sup>64</sup> Notwithstanding such criticism, numerous attempts to overturn *Mackay* through legislation have failed,<sup>65</sup> and the doctrine has prevailed since 1938.

The current Chairman of the National Labor Relations Board believes that both *Lechmere* and *Mackay* are contrary to the purposes of the NLRA. Responding to a letter from Republican members of the House Economic and Educational Opportunities Committee expressing concern regarding his public statements

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<sup>60</sup> *Id.* at 13-14.

<sup>61</sup> 502 U.S. 527 (1992). See Cynthia L. Estlund, *Labor, Property and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994) (criticizing *Lechmere* Court's expansive conception of property rights and restrictive conception of employees' § 7 rights).

<sup>62</sup> 502 U.S. at 535-41. The Court recently decided a related issue, dealing with the relationship between rights created by the NLRA and the employer's property right to exclude, in *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995). The Court unanimously held that applicants for jobs who are also paid union organizers are "employees" within the meaning of the NLRA. *Id.* at 457. Thus, it can be an unfair labor practice to refuse to hire such an applicant because she is a paid union organizer. The *Town & Country* decision is somewhat surprising after *Lechmere*.

<sup>63</sup> 304 U.S. 333 (1938).

<sup>64</sup> *E.g.*, Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 300 (1991) (arguing *Mackay* doctrine "makes a mockery of the supposed right to strike"); see also Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 567 (asserting that, because of *Mackay*, "resort to the statutory 'right' to strike would be, for many employees, an exercise in permanent job loss, and for the union, an act of potential self-immolation").

<sup>65</sup> See William R. Corbett, *A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far, Far Better Thing" Than the Workplace Fairness Act*, 72 N.C. L. REV. 813, 827 n.74 (1994) (chronicling history of unsuccessful legislative attempts to overrule *Mackay* doctrine).



advocating reform of the striker replacement law embodied in *Mackay*, Chairman William Gould stated, "I continue to believe that both *Lechmere* and *Mackay* are bad law and inconsistent with the basic purposes of the National Labor Relations Act, but I am committed to the impartial administration of the law as interpreted by the Supreme Court."<sup>66</sup>

Still, in terms of the Supreme Court's flouting of congressional intent, the subordination of employees' statutory rights under the NLRA to employers' common-law prerogatives is not as egregious as the subordination of employees' rights under federal employment discrimination law. Although many commentators believe the Supreme Court's decisions in *Mackay* and *Lechmere* are contrary to the intent and purpose of the NLRA, Congress, by failing to enact legislation to overturn those decisions and return the law to what it intended, has not evidenced a similar belief.<sup>67</sup> In contrast, Congress, through passage of the Civil Rights Act of 1991, responded to the Court's subordination of rights under employment discrimination law.

Employment at will does not give up territory in its kingdom without a fight. The experience with the NLRA, the first federal law to attempt to claim some of that territory, reveals that the courts pay homage to the common-law doctrine. The story has been no different with federal employment discrimination law.

### C. FEDERAL EMPLOYMENT DISCRIMINATION LAW

*The anti-employment discrimination laws are suffused with a public aura for reasons that are well known . . . Congress has responded to . . . pernicious misconceptions and ignoble hatreds with humanitarian laws formulated*

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<sup>66</sup> Letter from William B. Gould IV, Chairman, the National Labor Relations Board, to Reps. Bill Goodling, Harris Fawell, and Pete Hoekstra (Apr. 19, 1995), reprinted in DAILY LAB. REP., Apr. 20, 1995, at E-1 to E-4.

<sup>67</sup> Several bills introduced in Congress in the late 1980s and 1990s that would have overturned or modified *Mackay* failed. Even had one passed, *Mackay's* survival since 1938 arguably suggests that Congress did not find the case to be such an affront as to require immediate action. Moreover, many interpret the amendment of the NLRA by the Landrum-Griffin Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959), as ratifying *Mackay*. E.g., Samuel Estreicher, *Strikers and Replacements*, 38 LAB. L.J. 287, 289 (1987).

*to wipe out the iniquity of discrimination in employment, not merely to recompense the individuals so harmed but principally to deter future violations.*

*The anti-employment discrimination laws Congress enacted consequently resonate with a forceful public policy vilifying discrimination.*<sup>68</sup>

The effusive and eloquent passage above is representative of what both Congress and the courts, including the Supreme Court, have said about federal employment discrimination law. The grand and all-encompassing goal of the statutes is self-evident: to eradicate discrimination in employment based on race, color, sex, religion, national origin, age, or disability.<sup>69</sup> How is such a complex goal to be achieved?

Both Congress and the courts have responded by breaking the larger goal down into two more functional objectives toward which the law historically has been directed. In enacting the Civil Rights Act of 1991, Congress stated that one of the two primary purposes of the Act was to strengthen protections and remedies "to provide more effective deterrence and adequate compensation for victims of discrimination."<sup>70</sup> In *Albemarle Paper Co. v. Moody*,<sup>71</sup> the Supreme Court declared the purposes of Title VII to be deterrence of employment discrimination and "make whole" compensation for the victims of discrimination.<sup>72</sup> The Court also paid lip service to these purposes in *McKennon*, noting, "Deterrence is one object of [the ADEA and Title VII]. Compensation for injuries caused by the prohibited discrimination is another."<sup>73</sup>

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<sup>68</sup> *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1234 (3d Cir. 1994), *cert. granted and judgment vacated*, 115 S. Ct. 1397 (1995).

<sup>69</sup> See, e.g., H.R. REP. NO. 914, 88th Cong., 1st Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2391-2394 (stating purpose and reasoning behind Civil Rights Act of 1964); see also *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995) (noting common purpose of ADEA and Title VII of eliminating workplace discrimination); Robert Brookins, Hicks, *Lies, and Ideology: The Wages of Sin Is Now Exculpation*, 28 CREIGHTON L. REV. 939, 940 n.4 (1995) (citing sources stating goal of Title VII).

<sup>70</sup> H.R. REP. NO. 40, 102d Cong., 1st Sess., pt.2, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694. The other primary goal was to overturn several Supreme Court decisions that "dramatically limited" civil rights protections. *Id.*

<sup>71</sup> 422 U.S. 405 (1975).

<sup>72</sup> *Id.* at 416-19.

<sup>73</sup> *McKennon*, 115 S. Ct. at 884.

Still unanswered, however, is a vital question: What is discrimination? What are these humanitarian laws to eradicate? What acts are they to deter? For what injurious acts by employers are those who are statutorily protected to be compensated? Title VII does not define discrimination.<sup>74</sup> Although stating that it is an unlawful employment practice to take adverse employment action "because of [an] individual's race, color, religion, sex, or national origin,"<sup>75</sup> the Act neither provides guidance as to what a plaintiff must prove to establish a violation<sup>76</sup> nor defines those troublesome words "because of."<sup>77</sup> Rather, Congress left the interpretation of what constitutes prohibited discrimination to the courts, which subsequently developed two principal theories of recovery under Title VII: disparate treatment<sup>78</sup> and disparate impact.<sup>79</sup> These

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<sup>74</sup> Jones, *supra* note 7, at 2345 ("Discrimination, the core evil to be addressed, is a figure entirely unformed within the empty space framed by the statute."); Rutherglen, *supra* note 7, at 127; Turner, *supra* note 7, at 409.

<sup>75</sup> 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. V 1993).

<sup>76</sup> Jones, *supra* note 7, at 2345.

<sup>77</sup> See Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 22 (1991) (explaining that defining prohibited discrimination hinges on interpreting phrase "because of").

<sup>78</sup> Disparate treatment theory is also recognized as a theory of recovery under the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and § 1981. See MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 91-92 (3d ed. 1994) (stating ADEA and Title VII adopt same definition of disparate treatment); *id.* at 140-41 (stating that Supreme Court has adopted unified approach to individual disparate treatment cases under Title VII, § 1981, and ADEA); see also Ennis v. National Ass'n of Business & Educ. Radio, 53 F.3d 55, 57-58 (4th Cir. 1995) (recognizing disparate treatment theory under ADA and using proof structure found under Title VII and ADEA); DeLuca v. Winer Indus., 53 F.3d 793, 797 (7th Cir. 1995) (same).

<sup>79</sup> The initial judicial recognition of disparate impact under Title VII and the subsequent codification of that theory of recovery are discussed *infra* note 105. Disparate impact is statutorily recognized under the ADA. 42 U.S.C. § 12112(b)(3)(A), (b)(6) (Supp. V 1993). Impact theory is not available under § 1981. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 388 (1982). Some federal courts have either held or assumed that disparate impact theory is available under the ADEA. *E.g.*, Houghton v. Sipco, Inc., 38 F.3d 953 (8th Cir. 1994); Fisher v. Transo Servs.-Milwaukee, Inc., 979 F.2d 1239 (7th Cir. 1992). The continuing authority of those decisions is dubious, however, in light of the Supreme Court's decision in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993). Although the Court in *Biggins* did not hold that disparate impact is inapplicable to ADEA actions, the Court's reasoning suggests this result. Indeed, the Seventh Circuit relied on *Biggins* in holding (somewhat ambiguously) that disparate impact is not available as a theory of recovery under the ADEA. EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995). The Supreme Court denied certiorari in *Francis W. Parker School*, notwithstanding the EEOC's petition urging the Court to reverse the Seventh Circuit. *Age*

two theories flesh out the prohibited discriminatory practices.

A plaintiff asserting a disparate treatment claim attempts to prove that an employer has treated her less favorably than others because of her race, color, religion, sex, national origin, age, or disability.<sup>80</sup> A plaintiff proceeding under a disparate treatment theory must prove that the employer acted with a discriminatory motive or animus.<sup>81</sup> The plaintiff can attempt to prove his case by offering either direct evidence of discrimination, such as explicit statements or "smoking gun" memos, or by indirect or circumstantial evidence.<sup>82</sup> Usually, employers, aware of the potential for lawsuits under federal employment discrimination law, do not give plaintiffs the luxury of relying on direct evidence.<sup>83</sup> Accordingly,

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*Discrimination: Justices Will Not Review Use of Disparate Impact in ADEA Cases*, DAILY LAB. REP., June 20, 1995, at E-1 to E-2.

<sup>80</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Most disparate treatment cases are individual disparate treatment cases. A second type of disparate treatment case, the pattern-or-practice or systemic disparate treatment case, resembles, in some respects, a disparate impact case. In such a case, a plaintiff attempts to show that an employer has engaged in a pattern or practice of intentionally discriminatory decisions which have resulted in a lower representation of the protected group members in the employer's work force than would have resulted had the employer made decisions randomly without regard to the protected characteristic. See Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond "Damned Lies,"* 68 WASH. L. REV. 477, 479 (1993) (examining issues of pattern-or-practice disparate treatment and statistical analysis therein); Turner, *supra* note 7, at 436-44 (same); see also ZIMMER ET AL., *supra* note 78, at 492-502 (discussing distinction between disparate treatment and disparate impact theories with respect to statistical analyses involved). Another type of systemic disparate treatment case involves an employer's maintenance of a formal facially discriminatory policy. See ZIMMER ET AL., *supra* note 78, at 193-210. Although both the disparate impact and the systemic disparate treatment theories address systemic discrimination, it is important to distinguish them. The systemic disparate treatment case requires a finding of intentional discrimination, whereas the disparate impact case does not. ZIMMER ET AL., *supra* note 78, at 492-93. Moreover, business necessity is a defense to a disparate impact claim, but not to a disparate treatment claim. *Id.* at 493 (citing § 703(k)(2) of the Civil Rights Act of 1991 and 42 U.S.C. § 2000e-2(k)(2) (Supp. V 1993)). Furthermore, the provision of the Civil Rights Act of 1991 authorizing awards of compensatory and punitive damages and jury trials in cases in which such damages are sought applies to only actions alleging "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)." 42 U.S.C. § 1981a(a)(1) (Supp. V 1993).

<sup>81</sup> *Teamsters*, 431 U.S. at 335 n.15.

<sup>82</sup> See BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 15 (2d ed. 1983) (identifying three types of evidence—direct, statistical, and comparative—as those available to plaintiffs in employment discrimination cases); Turner, *supra* note 7, at 432-33 (demonstrating differences between direct and indirect evidence of discrimination).

<sup>83</sup> SCHLEI & GROSSMAN, *supra* note 82, at 15; Turner, *supra* note 7, at 432.

in *McDonnell Douglas Corp. v. Green*,<sup>84</sup> the Supreme Court developed a framework, consisting of three parts, by which courts analyze circumstantial evidence in disparate treatment cases.<sup>85</sup> Under the analysis, a plaintiff makes out a prima facie case of intentional discrimination in a case involving failure to hire or promote by proving the following: 1) the plaintiff belongs to a protected class; 2) the plaintiff applied and was qualified for the job at issue; 3) despite the plaintiff's qualifications, the employer rejected him; and 4) after the employer rejected the plaintiff, the position remained open and the employer continued to seek applications from persons with qualifications similar to those of plaintiff.<sup>86</sup> If a plaintiff proves her prima facie case, a rebuttable

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<sup>84</sup> 411 U.S. 792 (1973).

<sup>85</sup> The *McDonnell Douglas* analysis apparently does not apply to cases in which plaintiffs present direct evidence of discrimination. *Trans World Airlines v. Thurston*, 469 U.S. 111, 112 (1985). In an ironic twist, some argue that, in the aftermath of *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), a plaintiff proceeding under the *McDonnell Douglas* analysis cannot prevail without direct evidence of discrimination. *E.g.*, *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 348 (1993) [hereinafter *The Supreme Court—Leading Cases*] ("Despite Justice Scalia's protestations to the contrary, *Hicks* effectively requires the plaintiff to show direct evidence of intent." (footnote omitted)); *see also* Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 1001 n.12 (1994) (citing lower court decisions interpreting *Hicks* as requiring direct evidence of discriminatory intent); *cf. Hicks*, 113 S. Ct. at 2761 (Souter, J., dissenting) ("The majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent."). *Hicks* does not explicitly impose such a requirement, and I think such an interpretation reads too much into the Court's opinion. *See* Brookins, *supra* note 69, at 965-66 (asserting *Hicks* does not explicitly or implicitly impose such requirement and that it does not exist "if one can still rely on the Court's own precedent").

A different analysis applies to disparate treatment cases involving so-called mixed motives. The Court adopted the analysis for Title VII cases in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See infra* notes 160-168 and accompanying text. The mixed-motives analysis was modified by the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(m) & § 2000e-5(g)(2)(B) (Supp. V 1993). For a discussion of differences and similarities between the *McDonnell Douglas* and mixed-motives analyses, *see* *Russell v. Microdyne Corp.*, 65 F.3d 1229, 1237 (4th Cir. 1995).

<sup>86</sup> *McDonnell Douglas*, 411 U.S. at 802. The Court was quick to point out that the elements of the prima facie case will vary depending on the facts. *Id.* at 802 n.13. For example, the Court in *McDonnell Douglas* actually stated as the first element of the prima facie case that the plaintiff must establish "that he belongs to a racial minority." *Id.* at 802. The Court explained in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), a case involving white plaintiffs, that *McDonnell Douglas* did not restrict Title VII to racial minorities. Rather, " 'specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations.' " *McDonald*, 427 U.S. at 279 n.6

presumption of intentional discrimination arises.<sup>87</sup> The Court bases this presumption on the rationale that the prima facie case eliminates the two most common legitimate reasons for not hiring a person: an absolute or relative lack of qualifications and a lack of an opening for the position being sought.<sup>88</sup> If the plaintiff makes out a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action.<sup>89</sup> If the employer satisfies its burden, the plaintiff then has an opportunity to prove that the employer's articulated reason is a pretext for discrimination.<sup>90</sup> The ultimate burden of persuasion that the employer intentionally discriminated remains with the plaintiff at all times.<sup>91</sup>

A plaintiff asserting a disparate impact theory of recovery asserts that a facially neutral employment practice (such as a job skills test) has a significantly disproportionate adverse effect on a group protected by the laws and that the practice cannot be justified by "business necessity."<sup>92</sup> In a disparate impact case, the plaintiff offers statistical evidence to establish that the protected class to which the plaintiff belongs is underrepresented in the employer's work force in comparison with a relevant labor force from which the employer hires or could hire.<sup>93</sup>

Several important distinctions exist between the two theories. First, individual disparate treatment is a narrow theory of recovery<sup>94</sup> that focuses on adverse decisions regarding the particular employee and turns on the "motive" of the decisionmaker, thus

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(quoting *McDonnell Douglas*, 411 U.S. at 802 n.13). Furthermore, the elements vary depending on the type of adverse employment action taken.

<sup>87</sup> *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

<sup>88</sup> *Burdine*, 450 U.S. at 254; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

<sup>89</sup> *McDonnell Douglas*, 411 U.S. at 802; see also *Burdine*, 450 U.S. at 255 (detailing employer's burden of production).

<sup>90</sup> *McDonnell Douglas*, 411 U.S. at 804; *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2752 (1993).

<sup>91</sup> *Hicks*, 113 S. Ct. at 2747.

<sup>92</sup> *Teamsters*, 431 U.S. at 335 n.15. "Business necessity" has been redefined several times by the Supreme Court and Congress since it was first articulated by the Court. The current definition is set forth in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. V 1993). The ADA uses the same definition. 42 U.S.C. § 12112(b)(6) (Supp. V 1993).

<sup>93</sup> *Browne*, *supra* note 80, at 482-83; *Turner*, *supra* note 7, at 444-45.

<sup>94</sup> *Turner*, *supra* note 7, at 431.

making it what has been termed a subjective, fault-based theory.<sup>95</sup> Disparate impact theory, in contrast, is an expansive theory,<sup>96</sup> focusing on a practice or procedure rather than on decisions regarding a particular employee, and under which motive is said to be irrelevant,<sup>97</sup> making it a theory of liability based on an objective view of fault.<sup>98</sup> Second, statistical evidence may be useful in a disparate treatment case, but such evidence is vital to a disparate impact case.<sup>99</sup> Third, disparate treatment adopts the perspective of the perpetrator and demands that a specific violation be identified,<sup>100</sup> whereas disparate impact adopts the perspective of the victim and looks for overall patterns of inequality.<sup>101</sup> The final distinction between the two theories, and perhaps the most important in terms of current controversies regarding employment discrimination law, is that many view the disparate treatment theory as attempting to achieve equality of opportunity and the disparate impact theory as attempting to achieve equality of result.<sup>102</sup>

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<sup>95</sup> Jones, *supra* note 7, at 2343 (describing contractarian model of fault, concerned with what employer actually thought); see also Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2375 (1994) (explaining that disparate treatment theory is premised on motivation of employer and "conceptualize[s] discrimination as the outcome of discrete, biased acts of individuals").

<sup>96</sup> Turner, *supra* note 7, at 444.

<sup>97</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); Blumoff & Lewis, *supra* note 6, at 13.

<sup>98</sup> Jones, *supra* note 7, at 2342-43.

<sup>99</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("The evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities."); Browne, *supra* note 80, at 479 (noting statistical evidence may be central to disparate treatment case that targets pattern or practice of intentional discrimination, but such evidence may not be sufficient or necessary).

<sup>100</sup> Rutherglen, *supra* note 7, at 126 (citing Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978)); see also Jones, *supra* note 7, at 2339 (decrying the paradigm of discrimination defining individual discriminatory decisions as evil to be addressed and requiring proof of discriminatory animus as being "[an] outsider's viewpoint [and] . . . the opposite of blacks' perspective").

<sup>101</sup> Rutherglen, *supra* note 7, at 126.

<sup>102</sup> Julie O. Allen et al., *A Positive Theory of the Employment Discrimination Cases*, 16 J. CORP. L. 173, 175 (1991); Blumoff & Lewis, *supra* note 6, at 8. I recognize that many people believe (and I am not disagreeing with them) that equality of opportunity cannot be achieved through use of the disparate treatment theory alone.

Disparate treatment is generally accepted as a meaning of discrimination that Congress intended to prohibit when it enacted Title VII. As the Court has articulated, "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII . . . ."<sup>103</sup> Even Professor Epstein, who favors repeal of federal employment discrimination law, admits that "a practical compromise" of limiting Title VII race cases to *individual* disparate treatment claims "would honor the original intentions of the statute."<sup>104</sup> As Professor Epstein's grudging concession suggests, he and others who acknowledge disparate treatment as a meaning of discrimination that Congress intended to address in Title VII, consider disparate impact an unwarranted or undesirable extension.<sup>105</sup>

The principal objections to disparate impact theory are based on its lack of an intent requirement<sup>106</sup> and its objective of achieving equality of results.<sup>107</sup> Because employers have developed and

<sup>103</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); see also Rutherglen, *supra* note 7, at 118 (arguing core meaning of discrimination requires intent to distinguish groups on basis of specified characteristics; consequently, disparate impact theory does not fit easily within concept of discrimination); see also Calloway, *supra* note 85, at 997 (referring to disparate treatment as "the most basic form of discrimination"); Chamallas, *supra* note 95, at 2375 (calling disparate treatment "[t]he most well-established theory of liability").

<sup>104</sup> EPSTEIN, *supra* note 22, at 181.

<sup>105</sup> Disparate impact was recognized originally by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There is considerable debate whether Congress, when it enacted Title VII, intended to create such a theory of recovery. *E.g.*, EPSTEIN, *supra* note 22, at 184-201 (asserting *Griggs* represents "systematic distortion of the language and outlook" of Title VII); Michael E. Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985). Regardless of one's conclusion on that issue, Congress, in the Civil Rights Act of 1991, codified the disparate impact theory for Title VII actions. 42 U.S.C. § 2000e-2(k) (Supp. V 1993).

<sup>106</sup> EPSTEIN, *supra* note 22, at 160; Rutherglen, *supra* note 7, at 118. *But see* Jones, *supra* note 7, at 2343 (criticizing "mentalistic and subjective" concept of fault).

<sup>107</sup> See, *e.g.*, Blumoff & Lewis, *supra* note 6, at 14-15 (noting paradox inherent in disparate impact theory that neutrality is equated with discrimination and discussing perception that requiring preferential treatment is type of discrimination, the very thing prohibited by Title VII); Rutherglen, *supra* note 7, at 127-30 (pointing out that disparate impact is itself "discrimination" under the ordinary meaning of the term). *But see* Jerome M. Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 979 (1993) (criticizing "jurisprudence of celebration of the status quo as race neutral"); Jones, *supra* note 7, at 2340 (criticizing, for its refusal to consider historical inequities, "relentless formalism" of view that affirmative



implemented plans and strategies to avoid liability in disparate impact cases, this theory is deemed the impetus for voluntary affirmative action plans, preferences, and quotas.<sup>108</sup> Indeed, in *Watson v. Fort Worth Bank & Trust*,<sup>109</sup> after the Supreme Court announced that the disparate impact theory would be applied to subjective criteria as well as objective criteria used to make employment decisions,<sup>110</sup> a plurality of the Court quickly turned to the problem of quota fear. To assuage employers' putative belief that the extension of disparate impact would require implementation of quota hiring, the plurality diluted the "business-necessity" defense, styling it a "job-relatedness" defense,<sup>111</sup> and held that the burden of persuasion on the business-necessity defense remained with the plaintiff.<sup>112</sup> It has become increasingly fashionable in recent times to excoriate affirmative action plans and other attempts to eradicate the effects of past discrimination as, ironically, a type of discrimination.<sup>113</sup> The distaste for affirmative action and dispa-

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action is itself discrimination).

<sup>108</sup> Allen et al., *supra* note 102, at 199 (describing affirmative action as attempt to avoid liability for discrimination); Rutherglen, *supra* note 7, at 136-39 (describing relationship between disparate impact and affirmative action); Turner, *supra* note 7, at 447-48 (same).

<sup>109</sup> 487 U.S. 977 (1988).

<sup>110</sup> *Id.* at 991.

<sup>111</sup> *Id.* at 997-98.

<sup>112</sup> *Id.* at 998.

<sup>113</sup> In June 1995, the Supreme Court, in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995), held that federal affirmative action programs challenged on constitutional grounds must be evaluated under a strict-scrutiny standard, and thus must serve a compelling governmental interest and be narrowly tailored in order to be upheld. With *Adarand*, the Court extended its holding in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which applied the same standard to state and local programs. In the aftermath of *Adarand*, it seems that open season has been declared on affirmative action, and many politicians have shown up for the hunt. During June 1995, House and Senate oversight committees convened hearings to examine federal affirmative action plans. *OFCCP Focus of House, Senate Hearings in June*, DAILY LAB. REP., June 12, 1995, at A-18; *Affirmative Action: Some Programs Will Fail Adarand Test, Patrick Tells House Oversight Panel*, DAILY LAB. REP., July 21, 1995, at AA-1 to AA-2. On July 20, 1995, the regents of the University of California (including Governor Pete Wilson, then-presidential candidate for the Republican party) voted to abolish affirmative action in hiring, contracting, and admissions at the nine universities in the system. *Affirmative Action: University of California Regents Ban Affirmative Action in Hiring, Admissions*, DAILY LAB. REP., July 24, 1995, at A-10 to A-11. One week later, Senate Majority Leader Bob Dole, another candidate for the Republican nomination, and Representative Charles Canady introduced in the Senate and House, respectively, the Equal Opportunity Act of 1995, a bill that would prohibit race and gender preferences in federal government programs. *Affirmative Action: Dole, Canady Plan Early*

rate impact is largely traceable to beliefs that efforts to eliminate discrimination should be rooted in colorblindness and equal opportunity, notions which tend to secure the status quo.<sup>114</sup>

In view of the numerous objections to the disparate impact theory and its association with the anathemas affirmative action and quotas, it is not surprising that the Court, in its first major assault on employment discrimination law, used its employment-at-will weaponry to inflict the greatest damage on disparate impact.<sup>115</sup> What is surprising, however, is that the Court's second major assault has targeted the disparate treatment theory, which embodies a generally accepted meaning of discrimination under the federal laws.<sup>116</sup> Before moving to those battles, however, it is appropriate to consider what the relationship between employment at will and federal employment discrimination law should be.

#### D. THE PROPER RELATIONSHIP BETWEEN EMPLOYMENT DISCRIMINATION LAW AND EMPLOYMENT AT WILL

Employment discrimination law must impinge on employment at will to some extent.<sup>117</sup> An employer can no longer fire an employee (or take other adverse employment actions) for a good reason, a bad reason, or no reason at all without potentially incurring liability.<sup>118</sup> Nevertheless, while some bad reasons *will* result in liability under employment discrimination law, those reasons are limited

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*Hearings on Bill to Eliminate Preferences*, DAILY LAB. REP., July 28, 1995, at A-1.

<sup>114</sup> See, e.g., Blumoff & Lewis, *supra* note 6, at 74-75 & n.427 ("[T]he full implications of disparate impact analysis appear to threaten the existing order, the regime of equal opportunity and its principal metaphor of colorblindness.").

<sup>115</sup> See *infra* notes 150-159, 169-172 and accompanying text (discussing this assault). The Court's decisions exalting management prerogatives over federal employment discrimination law were not limited to disparate impact cases. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), for example, addressed disparate treatment. It was in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), however, that the Court ran roughshod over disparate impact, rendering it virtually useless until the passage of the Civil Rights Act of 1991.

<sup>116</sup> See *supra* note 103 (citing sources recognizing disparate treatment as most readily accepted form of discrimination prohibited by Title VII).

<sup>117</sup> Blumoff & Lewis, *supra* note 6, at 71 ("The nearly absolute freedom that the employer once enjoyed is gone.").

<sup>118</sup> *Id.* at 70.

to the discriminatory "because of" bases listed in the statutes.<sup>119</sup> Thus, federal employment discrimination law "operate[s] against the presumed backdrop of at-will employment."<sup>120</sup>

Although discrimination law makes only a limited formal incursion on employment at will, it arguably does impinge more significantly in an informal way. Employers who are sued under a federal discrimination statute have their best chance of winning if they can offer a good reason for their adverse employment actions.<sup>121</sup> According to Professor Epstein, courts "will *rightly* be skeptical" of an employer's assertion that it did not discriminate if it offers no reason for its action, and in most cases, employers that offer bad, but nondiscriminatory, reasons will not be believed.<sup>122</sup>

This discussion of backdrops and slight incursions is only mildly helpful because it raises the question of how great an incursion the statutes should make. That question must be answered in a way that provides some useful guidance in determining the appropriate relationship in any given case. If the laws are to have any *practical* significance, they must displace employment at will to the extent necessary to effectuate the goals of the laws.<sup>123</sup> As discussed previously, the statutes' broad goal is to eliminate discrimination in employment, while the functional objectives are to deter discriminatory conduct and to make whole the victims of discrimination.<sup>124</sup> The Supreme Court, however, has refused to displace employment at will to the extent necessary to effectuate those objectives.

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<sup>119</sup> "[E]mployers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin." 110 CONG. REC. 6549 (1964) (statement of Sen. Humphrey during debate over Title VII).

<sup>120</sup> *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1233 (3d Cir. 1994), *cert. granted and judgment vacated*, 115 S. Ct. 1397 (1995); see also Kenneth G. Parker, Note, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 430 (asserting Congress intended for Title VII to alter employment at will only "slightly").

<sup>121</sup> Blumoff & Lewis, *supra* note 6, at 70-71 ("[Title VII] creates caution where none was necessary before.").

<sup>122</sup> EPSTEIN, *supra* note 22, at 148 (emphasis added).

<sup>123</sup> *Mardell*, 31 F.3d at 1233 n.20 ("[T]he employment-at-will doctrine has been abridged only to the extent necessary to enforce the federal employment discrimination laws.").

<sup>124</sup> See *supra* notes 68-73 and accompanying text (identifying purposes of discrimination laws).

### III. THE SUPREME COURT'S SUBORDINATION OF FEDERAL EMPLOYMENT DISCRIMINATION LAW TO EMPLOYMENT AT WILL

*If the statutes are intended to protect employees, is it proper judicial performance to render, over and over, single-minded interpretations that favor employers and that predictably produce congressional reversal?*<sup>125</sup>

The Court's campaign to bury the employment discrimination laws and policies beneath the slab of employers' prerogatives can be divided into two stages: before and after the Civil Rights Act of 1991. Furthermore, I consider three cases—*Furnco Construction Corp. v. Waters*,<sup>126</sup> *St. Mary's Honor Center v. Hicks*,<sup>127</sup> and *McKennon v. Nashville Banner Publishing Co.*<sup>128</sup>—to be the most important in this process.<sup>129</sup> In *Furnco*, the Court made it practically impossible for plaintiffs to win employment discrimination cases at the second stage of the *McDonnell Douglas* analysis—the employer's articulated legitimate, nondiscriminatory reason.<sup>130</sup> In *Hicks*, the Court substantially weakened plaintiffs' chances of winning cases at the third stage of the *McDonnell Douglas*

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<sup>125</sup> William P. Murphy, *Meandering Musings About Discrimination Law*, 10 LAB. LAW. 649, 654 (1994).

<sup>126</sup> 438 U.S. 567 (1978).

<sup>127</sup> 113 S. Ct. 2742 (1993).

<sup>128</sup> 115 S. Ct. 879 (1995).

<sup>129</sup> I realize that all three of the cases are disparate treatment cases. Although several cases involving disparate impact have been very significant, these cases are more important in the Court's ongoing subordination for three reasons. First, the Civil Rights Act of 1991 attempts to overturn most of the Court's holdings that weakened the disparate impact theory, but Congress has yet to pass legislation to overturn these disparate treatment cases. Second, disparate treatment is the type of discrimination most clearly targeted in federal employment discrimination law, see *supra* note 103 (citing sources identifying primacy of disparate treatment discrimination). Thus, the Court's assault on that theory more blatantly flouts congressional intent. Third, some argue that the Court has treated disparate impact as a subset of disparate treatment. Compare George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299 (1987) (arguing disparate impact is extension of disparate treatment) with Allen et al., *supra* note 102, at 177 (contending disparate treatment cases are subset of disparate impact cases) and with Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799, 804-08 (1985) (positing that disparate treatment and disparate impact are based on different underlying theories).

<sup>130</sup> *Furnco*, 438 U.S. at 577.

analysis—the plaintiff's proof that the employer's articulated reason is pretextual.<sup>131</sup> Finally, in *McKennon*, the Court targeted remedies and established that even if a plaintiff proves discrimination in a disparate treatment case, he may recover very little if there is after-acquired evidence of his wrongdoing.<sup>132</sup>

The practical effect of the Court's campaign is to make it difficult for plaintiffs to prevail and obtain adequate remedies in employment discrimination actions and, consequently, to discourage plaintiffs from suing. Thus, the subordination of employment discrimination law and policies to the employment-at-will doctrine takes place at two levels. First, within the cases, management prerogatives are being used to suppress the discrimination laws. Second, once the whole of discrimination law is weakened by the results in the individual cases, employment at will is left reigning over the landscape of employment relations because fewer victims of discrimination are willing to sue given their small chances of prevailing.<sup>133</sup>

#### A. INCIPIENT SUBORDINATION

The Supreme Court's subordination of employment discrimination law and its policies to the employment-at-will doctrine can be traced to its *Furnco* opinion in 1978.<sup>134</sup> The Court began with the

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<sup>131</sup> *Hicks*, 113 S. Ct. at 2749.

<sup>132</sup> *McKennon*, 115 S. Ct. at 886.

<sup>133</sup> See, e.g., *infra* notes 245-246 and accompanying text (discussing how this dual subordination operates in *Hicks*).

<sup>134</sup> See Blumoff & Lewis, *supra* note 6, at 71 (recognizing *Furnco* as Court's announcement of "its general disinclination to 'restructure' private business practices"). Professors Blumoff and Lewis point out that some earlier cases also evidence the Court's concern with balancing the policies of federal discrimination law against market forces. *Id.* (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) and *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977)). Not until *Furnco*, however, did the Court admonish courts not to second-guess employers' business practices. Moreover, it is *Furnco* that is later quoted by courts in decisions balancing employers' rights against discrimination victims' rights.

In a recent article, Professor D. Marvin Jones tracks the Court's "[s]ubmergence of [d]isparate [t]reatment in [s]ubjectivism," and the collapse of the disparate impact (effects) theory of discrimination. Jones, *supra* note 7, at 2347-59. Professor Jones tracks those themes through several of the same pre-*McKennon* cases that I identify as indicative of the Court's subordination of employment discrimination law to employment at will. Professor Jones, noting the relationship between the subjectivist view of intent and the common-law rights of the employer, states, "A related premise here is that the employer's 'traditional

disparate treatment theory and then moved to the disparate impact theory. The subordination escalated until, in 1989, the Court “dismembered” the disparate impact theory.<sup>135</sup> With employment discrimination law routed by the Court’s onslaught, Congress intervened in 1991 by passing the Civil Rights Act of 1991. But the war was not over.

1. *Furnco: Insulating the Employer’s Legitimate, Nondiscriminatory Reason Against Judicial Second-Guessing.* In *Furnco*, the plaintiffs were black bricklayers who had applied at the jobsite for employment.<sup>136</sup> The defendant’s superintendent had not hired two of the three plaintiffs,<sup>137</sup> although they were fully qualified, because the hiring practice was to hire only persons “whom he knew to be experienced and competent” or persons who were recommended to him.<sup>138</sup> The plaintiffs brought an action alleging racial discrimination in violation of Title VII. The trial court had accepted as the employer’s “legitimate, nondiscriminatory reason” that the company needed to hire people who had demonstrated

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prerogatives’ survive Title VII—that, in effect, the statute’s parameters are framed by common-law baselines.” *Id.* at 2354. Indeed, the subjectivist view of intent is related to the Court’s elevation of employment at will: Rather than closely examining an employer’s stated reason for its actions, the Court defers to the common-law prerogatives of the employer and admonishes that courts should not second-guess employers because courts are not competent to perform such evaluations. *E.g.*, *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

Professor Deborah C. Malamud traces a different but related theme through the Supreme Court’s decisions from *McDonnell Douglas* through *Hicks* in *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995). She views the decisions as insulating disparate treatment theory from the pro-plaintiff innovations in the Court’s disparate impact decisions. *Id.* at 2263-66. I disagree with Professor Malamud’s characterization of the *McDonnell Douglas* proof structure as “rest[ing] on an essentially conservative foundation.” *Id.* at 2266. Although she obviously is correct that many of the Court’s decisions applying the *McDonnell Douglas* analysis have reached results favoring defendants, I think the proof structure developed in *McDonnell Douglas* was a pro-plaintiff innovation. Notwithstanding our disagreement on *McDonnell Douglas*, I think there is some kinship in the themes she and I trace in the post-*McDonnell Douglas* decisions. Malamud notes that earlier cases in the *McDonnell Douglas* line contain both “quotable passages explaining the need to eradicate discrimination . . . . [and] passages . . . that articulate a need to protect management prerogative against undue incursions.” *Id.* at 2312-13 (footnote omitted). She, like I, also recognizes that this same “problem” exists in the Supreme Court’s decisions involving the NLRA. *Id.* at 2313 n.268.

<sup>135</sup> Blumoff & Lewis, *supra* note 6, at 33-45.

<sup>136</sup> *Furnco*, 438 U.S. at 569.

<sup>137</sup> The third plaintiff was hired so late in the project that he had the opportunity to work only 20 days. *Waters v. Furnco Constr. Co.*, 551 F.2d 1085, 1088 (7th Cir. 1977).

<sup>138</sup> *Furnco*, 438 U.S. at 570.

their competence to the superintendent and that evaluating qualifications at the gate of the worksite would be too chaotic.<sup>139</sup> Rejecting that reason, the Seventh Circuit described a "middle ground" approach between hiring at the gate and hiring only from bricklayers known to the superintendent,<sup>140</sup> and ultimately held for the plaintiffs.

The Supreme Court reversed, explaining that the court of appeals had misconceived the second part of the *McDonnell Douglas* analysis.<sup>141</sup> The Court explained that to satisfy the second part, the employer need only offer "some legitimate, nondiscriminatory reason."<sup>142</sup> The employer's practice need not be the best for hiring the maximum number of minority employees.<sup>143</sup> The Court explained that courts are not competent to restructure employers' business practices, "and unless mandated to do so by Congress they should not attempt it."<sup>144</sup> The underlying rationale for this "refinement" of the second part of the *McDonnell Douglas* analysis is quite clear: courts should not tread on employers' prerogatives in order to achieve the goals of Title VII.<sup>145</sup> Interestingly, the

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<sup>139</sup> *Waters*, 551 F.2d at 1088.

<sup>140</sup> *Id.* The court's recommendation really was quite simple: take written applications that would indicate the qualifications of the applicant and then compare the qualifications of the applicant with those of persons on the superintendent's list. *Id.* at 1088-89.

<sup>141</sup> *Furnco*, 438 U.S. at 578.

<sup>142</sup> *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1978)).

<sup>143</sup> *Id.* at 577-78. Professor Jones challenges the Court's proclamation with the question, "Why not?" Jones, *supra* note 7, at 2350. Professor Jones then answers his question by explaining that the Court assumes that the discrimination prohibited by Title VII is a product of an employer's intent, and because *Furnco* exhibited no intent to exclude blacks in this case, no prohibited discrimination occurred. *Id.* I do not disagree with that answer. Tracking a different but related theme through the Court's decisions, however, I arrive at a different but closely related answer.

<sup>144</sup> *Furnco*, 436 U.S. at 578.

<sup>145</sup> See Blumoff & Lewis, *supra* note 6, at 71 (citing *Furnco* in support of proposition that "common-law baselines have long informed" Court's Title VII jurisprudence); see also Culp, *supra* note 107, at 967 (citing passage from *Furnco* regarding courts' incompetence to restructure business practices as evidence that some federal judges believe Title VII cannot effectively eliminate discrimination because such law is unable to control market forces).

An alternative explanation may be that, regardless of whether the law *can* control market forces, judges, operating from a baseline of employment at will, do not believe that the law *should* control market forces and employers' prerogatives. See Massey, *supra* note 46, at 557-60 (discussing Chief Justice Rehnquist's views on old property (based on traditional criteria of ownership) and new property (based on government entitlements) in context of employment at will). Then-Justice Rehnquist authored the majority opinion in *Furnco*.

*Furnco* admonition regarding judicial incompetence to second-guess employers parallels one of the theories explaining the widespread adoption of employment at will by state courts. Courts adopted the doctrine because they did not deem themselves competent to evaluate employers' discharge decisions.<sup>146</sup>

The Court could have interpreted "legitimate, nondiscriminatory reason" as allowing an examination of the objective reasonableness of the reason articulated by the employer. Indeed, one would expect such an interpretation if the Court were more interested in effectuating the objectives of employment discrimination law than protecting employers' common-law prerogatives.<sup>147</sup> Instead, the Court in *Furnco* balanced employers' prerogatives and federal employment discrimination law and struck a balance in favor of employers' prerogatives. This theme was to be repeated in subsequent decisions, becoming more slanted each time *Furnco* was invoked.

The Court in *Furnco* also observed that, although it was decreasing a plaintiff's chance of victory at the second stage of the *McDonnell Douglas* analysis, the plaintiff still could prevail at stage three by proving that the employer's legitimate, nondiscriminatory reason was in fact a pretext for discrimination.<sup>148</sup> Fifteen years later, the Court would extrapolate the employer-prerogative theme of *Furnco* to render an interpretation of the pretext stage that virtually forecloses plaintiffs from winning cases at that stage of the analysis. This further frontal assault on the disparate treatment analysis would not come to fruition until 1993 in *St.*

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<sup>146</sup> Morriss, *supra* note 35, at 762-63.

<sup>147</sup> See Jones, *supra* note 7, at 2349-50 (explaining that inquiry into reasonableness comports with role of *McDonnell Douglas* prima facie case—eliminating most-common nondiscriminatory explanations for acts—and with proper balance between policies of Title VII and legitimate business concerns). Professor Murphy reaches the following conclusion regarding the Court's construction of Title VII:

At one time, it was an accepted canon of statutory construction (canonized by the Supreme Court) that remedial social legislation should be hospitably and generously construed to effectuate its purpose. Beginning in about 1976, this canon of construction was largely abandoned by the Supreme Court in discrimination law, and in subsequent years, culminating in 1989, the Court produced a series of decisions in which it rejected the view of law that favored employees and adopted a view that favored employers.

Murphy, *supra* note 125, at 653.

<sup>148</sup> *Furnco*, 438 U.S. at 578.



*Mary's Honor Center v. Hicks*.<sup>149</sup> In the meantime, the Court availed itself of several opportunities to subordinate discrimination victims' rights to employers' rights, most notably decimating the disparate impact theory and weakening the disparate treatment theory in mixed-motives cases.

2. *Extrapolating from Furnco: The Mantra of Judicial Incompetence and Employers' Prerogatives*. In 1988, a plurality of the Court incorporated the theme of supremacy of employers' prerogatives from *Furnco* into its decision in *Watson v. Fort Worth Bank & Trust*<sup>150</sup> to weaken the disparate impact theory and lay the foundation for a more devastating attack in *Wards Cove*. In *Watson*, the plaintiff, a black woman who several times had been passed over for a promotion, brought an action under Title VII alleging race discrimination under disparate impact theory. The Court first held that disparate impact analysis is applicable not only to objective employment criteria, but also to subjective criteria.<sup>151</sup> However, a plurality of the Court then went on to significantly reduce a plaintiff's chances of recovering under the disparate impact theory. First, the plurality announced that, as part of the *prima facie* case, a plaintiff must isolate the specific employment practice challenged and then establish a causal relationship between that practice and the exclusion of members of the protected group.<sup>152</sup> Next, it articulated a "watered-down" version of the employer's business-necessity defense, requiring only that the challenged practice be sufficiently related to a legitimate business purpose.<sup>153</sup> Finally, the plurality placed the burden of persuasion of that defense on the plaintiff.<sup>154</sup>

The plurality also suggested a change adverse to plaintiffs in the third stage of a disparate impact case, at which a plaintiff attempts to demonstrate that an alternative test or device would achieve the employer's objectives without the discriminatory effects. The plurality stated that cost and other burdens imposed by the

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<sup>149</sup> 113 S. Ct. 2742 (1993); see *infra* notes 188-237 and accompanying text (discussing *Hicks*).

<sup>150</sup> 487 U.S. 977 (1988).

<sup>151</sup> *Id.* at 991.

<sup>152</sup> *Id.* at 994 (plurality opinion).

<sup>153</sup> *Id.* at 999.

<sup>154</sup> *Id.* at 998.

proposed alternative are relevant in determining whether the alternative is “equally as effective as the challenged practice” in achieving the employer’s legitimate goals.<sup>155</sup>

Having altered the disparate impact case in these ways, the plurality conjured up *Furnco* and further diluted the business necessity defense by admonishing that, in determining whether subjective employment criteria are sufficiently related to legitimate business purposes, courts must bear in mind that they “‘are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.’”<sup>156</sup> The plurality acknowledged that plaintiffs would find it difficult to prevail under these “high standards of proof in disparate impact cases”<sup>157</sup> and explained that such standards were necessary to prevent giving incentives to employers to “introduc[e] quotas or preferential treatment” as a method of avoiding liability.<sup>158</sup> Thus, the plurality was careful to show that it would not interpret employment discrimination law in a manner favoring plaintiffs without imposing significant limitations on them, a position that in fact made the decision more of a defeat for plaintiffs. This theme was to be played out again in *McKennon v. Nashville Banner Publishing Co.*<sup>159</sup>

The following year, the Court fired salvos at both the disparate treatment theory and the disparate impact theory, rendering the latter virtually a dead letter. First, the Court attacked disparate treatment in *Price Waterhouse v. Hopkins*,<sup>160</sup> in which yet another plurality of the Court honed its *Furnco* language and clearly stated its subordination of Title VII to employers’ prerogatives. In *Price Waterhouse*, the Court encountered a Title VII plaintiff to whom the defendant accounting firm had denied a partnership promotion

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 999 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* Professor Culp describes the plurality’s discussion as “turn[ing] Title VII on its head to protect white employers’ ability to perpetuate procedures that freeze black workers out of the job market, while forestalling any success by the processes created by Title VII to encourage employers to take account of the number of black workers hired.” Culp, *supra* note 107, at 1003.

<sup>159</sup> 115 S. Ct. 879 (1995); see *infra* notes 273-396 and accompanying text (discussing *McKennon*).

<sup>160</sup> 490 U.S. 228 (1989).

based on both an illegal reason—her sex—and a legal reason—her lack of interpersonal skills.<sup>161</sup> A plurality of the Court developed a framework for analyzing such “mixed-motives” disparate treatment cases, that is, those in which the employer’s adverse decision was motivated by both an illegitimate, discriminatory reason and a legitimate, nondiscriminatory reason.<sup>162</sup> The plurality announced at the outset the policies that would drive its decision: “Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice. This balance between employee rights and *employer prerogatives* turns out to be decisive in the case before us.”<sup>163</sup> The plurality concluded that when an employer considers both gender and legitimate factors in making a decision, it makes the decision “because of” sex within the meaning of Title VII’s prohibition.<sup>164</sup> The plurality then went on to hold that an employer, even if it had acted contrary to Title VII, could avoid imposition of liability by proving that it would have taken the same action in the absence of the discriminatory motive.<sup>165</sup> In announcing this “affirmative defense” to Title VII liability, the plurality reiterated its emphasis on employers’ prerogatives:

To say that an employer may not take gender into account is not, however, the end of the matter. . . . The other important aspect of the statute is its *preservation of an employer’s remaining freedom of choice*. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. The statute’s *maintenance of employer prerogatives* is evident from the statute itself and from its history, both in Congress and in this Court.<sup>166</sup>

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<sup>161</sup> *Id.* at 234-35.

<sup>162</sup> *Id.* at 240.

<sup>163</sup> *Id.* at 239 (emphasis added).

<sup>164</sup> *Id.* at 241.

<sup>165</sup> *Id.* at 242, 258.

<sup>166</sup> *Id.* at 242 (emphasis added).

In his dissent, Justice Kennedy criticized the plurality's internal inconsistency in determining that an employer has made a decision "because of" sex and yet permitting the employer to avoid liability notwithstanding its violation of the statute.<sup>167</sup> He pointed out that neither the language of Title VII nor its legislative history supported an affirmative defense based on employers' prerogatives.<sup>168</sup>

*Wards Cove Packing Co. v. Atonio*,<sup>169</sup> also decided in 1989, is notable for the majority's adoption of the *Watson* plurality's disparate impact analysis. The Court clarified the *Watson* version of the employer's business "necessity" test as "whether a challenged practice serves, in a significant way, the legitimate goals of the employer."<sup>170</sup> The Court also placed its imprimatur on the *Watson* plurality's adjustments of the plaintiff's demonstration of less discriminatory alternatives, holding that they must be as "equally effective" as the employer's chosen practice, and that cost and other burdens imposed by the alternatives are relevant in determining their effectiveness.<sup>171</sup> Of course, the Court again quoted from *Furnco* the mantra regarding courts' inferior competence in restructuring business practices.<sup>172</sup>

3. *Congress Strikes Back: The Civil Rights Act of 1991.* *Price Waterhouse* and *Wards Cove* were not the only decisions rendered by the Court in 1989 that were adverse to plaintiffs under federal employment discrimination law and its underlying policies.<sup>173</sup>

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<sup>167</sup> *Id.* at 285 (Kennedy, J., dissenting).

<sup>168</sup> *Id.* at 286; see also Mark C. Weber, *Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495, 520 (1990) (asserting plurality stumbled by inventing "management prerogative exception" to Title VII liability in mixed-motives cases).

<sup>169</sup> 490 U.S. 642 (1989).

<sup>170</sup> *Id.* at 659.

<sup>171</sup> *Id.* at 661.

<sup>172</sup> *Id.* The *Wards Cove* Court did demonstrate some originality, placing the seemingly required *Furnco* passage in the context of its discussion of the alternative practices. *Id.* The *Watson* Court, on the other hand, had invoked the words when warning courts about evaluating the sufficiency of the relationship between the employer's chosen practice and its legitimate goals. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988).

<sup>173</sup> See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-78 (1989) (limiting reach of 42 U.S.C. § 1981 in employment discrimination actions by holding that § 1981 does not apply to conduct occurring after formation of contract); *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (holding white plaintiffs harmed by affirmative action plan in consent decree arising from separate action were not precluded from challenging plan); *Lorance v. AT&T Technologies*, 490 U.S. 900, 911 (1989) (holding statute of limitations applicable to dis-

Indeed, employers won thirteen of fourteen employment law cases decided during the 1988-89 term.<sup>174</sup> Congress set about to stem the tide of the assault on discrimination law, passing the Civil Rights Act of 1990,<sup>175</sup> but President Bush, labelling the legislation a "quota bill," vetoed it.<sup>176</sup> During its next session, Congress reintroduced and passed the proposed legislation, and President Bush signed into law the Civil Rights Act of 1991.<sup>177</sup> The Act had as one of its purposes overturning several of the Court's decisions, particularly from the 1988-89 term.<sup>178</sup>

Shortly after passage of the 1991 Act, Professor Culp, predicting Congress would soon need to reform the law again, noted, "Undoubtedly, these will be the Civil Rights Acts of 1998, 2005, and 2010."<sup>179</sup> He further predicted that, like the Civil Rights Act of 1991, none of these chimerical laws would permanently resolve race problems in our society.<sup>180</sup> He premised this prediction on his belief that courts are unwilling to raise and address the "race question," which he formulates as, "How does race alter the

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crimination actions based on challenge to facially neutral seniority plan begins to run on plan's adoption date rather than date plan harms plaintiff); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (denying plaintiff class award of attorney's fees against union intervening in class action to challenge settlement agreement, where intervention not frivolous, unreasonable, or without foundation).

<sup>174</sup> Murphy, *supra* note 125, at 654. Professor Murphy assesses the Court's treatment of the federal employment discrimination laws in definitive terms: "Not since the New Deal days has the Supreme Court given laws passed by Congress such hostile treatment." *Id.*

<sup>175</sup> *Congress Approves Civil Rights Bill but Falls Short of Veto-Proof Majority*, DAILY LAB. REP., Oct. 18, 1990, at A-4.

<sup>176</sup> 136 CONG. REC. S16,418-19 (daily ed. Oct. 22, 1990).

<sup>177</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended principally in scattered sections of 42 U.S.C. (Supp. V 1993)). Professor Culp notes that the 1991 Act, like its predecessor, appeared destined to be vetoed. Culp, *supra* note 107, at 965. Culp muses about the effect that the confirmation of Justice Clarence Thomas may have had on the President's decision to sign the bill. *Id.*

<sup>178</sup> H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 2-4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96. Commentators have criticized the Act for various reasons. *See, e.g.,* Jones, *supra* note 7, at 2364 n.198 (criticizing Act's failure to overturn requirement in *Wards Cove* that plaintiffs identify specific practice causing discriminatory harm); Turner, *supra* note 7, at 456 & n.373 (noting commentators have criticized Act for returning law to inconsistent pre-*Wards Cove* case law without offering clarification). *See generally* Symposium, *The Civil Rights Act of 1991: Unraveling the Controversy*, 45 RUTGERS L. REV. 889 (1993) (discussing various aspects of Act).

<sup>179</sup> Culp, *supra* note 107, at 967.

<sup>180</sup> *Id.*

contours of legal reality?"<sup>181</sup> Professor Culp was proven to be prophetic even sooner than he expected, as the Court decided *Hicks* in time for him to add a postscript to his article.<sup>182</sup>

I agree with Culp: If federal employment discrimination law is to retain (or regain) a role as a body of law embodying and serving public policy rather than being reduced to just another basis for tort recovery, Congress will have to step in again and again. Will Congress ever be able to effect the "permanent" change that Culp deems impossible? I posit that such reform will not be possible until the Supreme Court stops subordinating federal employment discrimination law and its policies to the employment-at-will doctrine. In *Hicks* and *McKennon*, the Court announced in a stentorian voice that it is not about to do so.

#### B. ESCALATING SUBORDINATION

Not to be subdued by Congress,<sup>183</sup> the Court took the offensive again in 1993, targeting the disparate treatment theory, with its decision in *St. Mary's Honor Center v. Hicks*.<sup>184</sup> *Hicks* reached a new level in the subordination of employment discrimination law, but it was soon to be surpassed by the Court's decision in *McKennon v. Nashville Banner Publishing Co.*<sup>185</sup> *Hicks* and *McKennon* each illustrate the Supreme Court's subordination of employment discrimination law to employment at will. That message becomes all the more apparent, however, when the two cases, which share some characteristics, are compared.<sup>186</sup>

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<sup>181</sup> *Id.* at 966-67.

<sup>182</sup> *Id.* at 1007-10.

<sup>183</sup> Commenting on the *Hicks* decision following enactment of the Civil Rights Act of 1991, Professor Culp stated:

One might have thought that the conservative majority on this Court might have been chastened by Congress' actions in specifically rejecting several Supreme Court opinions in the 1991 Civil Rights Act, but it is clear . . . that this Court will continue to force Congress to rewrite the Court's interpretation of Title VII law.

*Id.* at 1010; see also Brookins, *supra* note 69, at 943 (observing Congress's enactment of 1991 Act left Court "undaunted[,] . . . because the Court is inherently more agile than Congress").

<sup>184</sup> 113 S. Ct. 2742 (1993).

<sup>185</sup> 115 S. Ct. 879 (1995).

<sup>186</sup> Two commentators, writing between the Court's decisions in *Hicks* and *McKennon*, suggested the importance of comparing the cases:

[I]t will be interesting to see what approach the Court adopts [in *McKennon*],

1. Hicks: *Eviscerating Plaintiffs' Opportunity to Prevail at the Pretext Stage.*

*You know I hate, detest, and can't bear a lie, not because I am straighter than the rest of us, but simply because it appal[l]s me. There is a taint of death, a flavour of mortality in lies—which is exactly what I hate and detest in the world—what I want to forget. It makes me miserable and sick, like biting something rotten would do.*<sup>187</sup>

a. *The Decision and Analysis.* In *Hicks*, the plaintiff was a correctional officer fired by the defendant halfway house after engaging in a heated exchange with his newly appointed supervisor, in which he allegedly threatened the supervisor.<sup>188</sup> Hicks had an unremarkable employment record prior to the new supervisor's appointment, but thereafter he was disciplined several times—a suspension for five days based on his subordinates' rules violations; a letter of reprimand for failure to adequately investigate a brawl between inmates; and a demotion from shift commander to correctional officer for failing to have his subordinates log in use of an employer-owned vehicle<sup>189</sup>—before ultimately being discharged.<sup>190</sup> After his discharge, Hicks brought an action alleging discrimination based on race in violation of Title VII and section 1983.<sup>191</sup>

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particularly in light of its decision in *Hicks* where the employer had created a pretext for the termination and the Court held that the employer's lying did not result in a verdict for the employee as a matter of law.

Robert B. Fitzpatrick & Marlissa S. Briggett, *Review of Significant U.S. Supreme Court and Appellate Decisions*, in A.L.I.-A.B.A. COURSE OF STUDY: CURRENT DEVELOPMENTS IN EMPLOYMENT LAW (1994).

<sup>187</sup> JOSEPH CONRAD, *HEART OF DARKNESS* 27 (Robert Kimbrough ed., 1963).

<sup>188</sup> *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2746 (1993).

<sup>189</sup> Although the Supreme Court did not include these facts in its recitation, the trial court found that several white shift commanders had committed arguably more egregious violations than Hicks for which they had not been disciplined as harshly. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1248 (E.D. Mo. 1991). Moreover, the trial court noted that Hicks's outburst occurred immediately after he was advised of his demotion and only after the supervisor had provoked him. *Id.* at 1251. Indeed, the court found that the supervisor "manufactured the confrontation between plaintiff and himself in order to terminate plaintiff." *Id.*

<sup>190</sup> *Hicks*, 113 S. Ct. at 2746.

<sup>191</sup> 42 U.S.C. § 1983 (1988).

The employer offered as the legitimate reasons for discharging Hicks his repeated and increasingly severe violations of the employer's rules.<sup>192</sup> The district court concluded that the plaintiff had satisfied the third stage of the *McDonnell Douglas* analysis by proving his employer's articulated reasons were pretextual.<sup>193</sup> The plaintiff's proof of pretext consisted of evidence that, although his coworkers had committed rules violations at least as severe, they were disciplined less harshly.<sup>194</sup> Nonetheless, the district court held that the plaintiff did not satisfy the ultimate burden of proving intentional discrimination. The court concluded that, although the reasons given by the employer were false, the plaintiff "ha[d] not proven that the crusade [to terminate him] was racially rather than personally motivated."<sup>195</sup>

On appeal, the Eighth Circuit reversed, holding that a plaintiff who proves pretext at the third stage of the *McDonnell Douglas* analysis is entitled to judgment as a matter of law.<sup>196</sup> In a five-to-four decision, the Supreme Court reversed, holding that a finding of pretext does not mandate judgment for a plaintiff as a matter of law.<sup>197</sup>

The opinions of the majority and the dissent are remarkably contentious. Justice Scalia, writing for the majority, suggests in no uncertain terms that the dissent misunderstands the Court's precedent on this issue<sup>198</sup> and finds absurd the dissent's characterization as a "liar" an employer whose articulated reason is not believed.<sup>199</sup> Justice Souter, writing the dissenting opinion, does indeed accuse the majority of abandoning the well-established *McDonnell Douglas* framework and its primary purpose<sup>200</sup> and of adopting instead an analysis that favors lying employers over victims of discrimination.<sup>201</sup>

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<sup>192</sup> *Hicks*, 113 S. Ct. at 2746.

<sup>193</sup> *Hicks*, 756 F. Supp. at 1251.

<sup>194</sup> *Id.* at 1248, 1251.

<sup>195</sup> *Id.* at 1252.

<sup>196</sup> *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492-93 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

<sup>197</sup> *Hicks*, 113 S. Ct. at 2749.

<sup>198</sup> *Id.* at 2750 ("Only one unfamiliar with our case-law will be upset by the dissent's alarum that we are today setting aside 'settled precedent[] [and] . . . 'two decades of stable law in this Court[.]'").

<sup>199</sup> *Id.* at 2754.

<sup>200</sup> *Id.* at 2757 (Souter, J., dissenting).

<sup>201</sup> *Id.* at 2763, 2766.



*Hicks* is an important case in employment discrimination law because of its focus on defining a plaintiff's burden at the third stage of the *McDonnell Douglas* analysis. Because plaintiffs usually can make out a prima facie case of discrimination, and because defendants usually can produce evidence of legitimate reasons for their actions, most disparate treatment cases analyzed under *McDonnell Douglas* are won or lost at the third stage of the analysis.<sup>202</sup> Dealing as it does with the most significant stage of the *McDonnell Douglas* analysis, the Court in *Hicks* declares very bad law for plaintiffs under federal employment discrimination law.<sup>203</sup> As bad as the holding of the case is for plaintiffs, the ambiguities of the decision have created even worse law in some lower court interpretations of *Hicks*.

Prior to *Hicks*, the fleshing out of the third stage of the *McDonnell Douglas* analysis had taken shape in the lower courts as a battle between "pretext-only" and "pretext-plus."<sup>204</sup> The questions on which the courts focused were whether the third stage required a plaintiff to prove only that an employer's articulated reasons were *pretextual* or rather that the reasons were *pretexts for discrimination* (that is, both that the articulated reasons were false and that the true reason was discriminatory) and what types of evidence had

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<sup>202</sup> Catherine Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 67 (1991).

<sup>203</sup> Although the plaintiff in *Hicks* brought his claim under only Title VII, the Equal Employment Opportunity Commission (EEOC) interprets *Hicks* as applying equally to disparate treatment claims under the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act of 1973. EEOC: ENFORCEMENT GUIDANCE ON *ST. MARY'S HONOR CENTER V. HICKS*, reprinted in DAILY LAB. REP., Apr. 13, 1994, at F-3 n.2.

<sup>204</sup> See, e.g., Brookins, *supra* note 69, at 946 (detailing battle between circuits over use of pretext-only and pretext-plus); Lancot, *supra* note 202, at 71 (citing inconsistency among federal circuits resulting from battle over pretext-only and pretext-plus); see also Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122-23 (7th Cir. 1994) (discussing pretext-plus, pretext-only, and a version of pretext-only, and stating Court in *Hicks* adopted compromise approach of variation of pretext-only).

Professor Malamud suggests a formulation that is perhaps more helpful than pretext-only/pretext-plus because it describes the effects of the "combined evidence" of the plaintiff (from the first and third stages of the *McDonnell Douglas* analysis). Malamud, *supra* note 134, at 2306-07. Three positions are possible: "judgment for plaintiff always permitted"; "judgment for plaintiff sometimes permitted"; and "judgment for defendant required." *Id.* at 2306.

to be proffered to satisfy the burden.<sup>205</sup> In *Hicks*, the Supreme Court chose the latter interpretation, holding that a plaintiff satisfies his burden at stage three by proving both that the employer's articulated reasons are pretextual and that the true reason is a prohibited discriminatory one. However, the Court in *Hicks* left unclear what evidence a plaintiff must proffer to prove that the true reason is discriminatory.

Some commentators have interpreted the majority's opinion as adopting a "pure" pretext-plus approach, requiring a plaintiff to establish a prima facie case, prove the employer's articulated reasons to be pretextual, and present additional direct evidence of discrimination.<sup>206</sup> Indeed, the *Hicks* dissent reads the majority's approach as being susceptible of a pretext-plus interpretation.<sup>207</sup> Notwithstanding the arguably contradictory language in the majority's opinion,<sup>208</sup> the better interpretation of the decision is that the Court adopted a middle ground between pretext-only and

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<sup>205</sup> See, e.g., *Anderson*, 13 F.3d at 1122-23 (detailing different approaches to pretext); Brookins, *supra* note 69, at 946 (same); Lancot, *supra* note 202, at 65-66 (same); see also Julian R. Birnbaum, *Some Recent Decisions and Current Issues in EEO Cases*, in CONTEMPORARY ISSUES IN LABOR AND EMPLOYMENT LAW: PROCEEDINGS OF NEW YORK UNIVERSITY 47TH ANNUAL NATIONAL CONFERENCE ON LABOR 445, 447-48 (Bruno Stein ed., 1995) [hereinafter CONTEMPORARY ISSUES] (describing pretext-only approach as treating evidence of pretext as "bipolar," meaning that it serves two purposes).

<sup>206</sup> E.g., *The Supreme Court—Leading Cases*, *supra* note 85, at 348.

<sup>207</sup> *Hicks*, 113 S. Ct. at 2762 (Souter, J., dissenting) ("This 'pretext-plus' approach would turn *Burdine* on its head . . .").

<sup>208</sup> Early in the opinion the Court states:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination [and] . . . "[n]o additional proof of discrimination is required."

*Hicks*, 113 S. Ct. at 2749. The foregoing passage suggests that the Court did not adopt a pure pretext-plus approach. Three pages later, however, the Court states the following: "Surely a more reasonable reading [of *Burdine*] is that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." *Id.* at 2752. This passage suggests that the Court did adopt a pure pretext-plus approach. See Jody H. Odell, Case Comment, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251, 1268-71 (1994) (discussing language in majority opinion supporting different interpretations).

pretext-plus (labelled by one commentator as "pretext-maybe"<sup>209</sup>), holding that if a plaintiff makes out a prima facie case and proves that the employer's articulated reason is false, the trier of fact *may*, although it is not *required to as a matter of law*, infer that the true reason was discriminatory.<sup>210</sup> Although this approach still requires some "plus" evidence (that is, in addition to the proof of falsity), that requirement apparently can be satisfied by the prima facie and pretext evidence if such evidence provides a connection between the falsity and the alleged discrimination.<sup>211</sup>

However, even if *Hicks* is interpreted as taking the middle-ground approach, that interpretation provides little comfort for plaintiffs. In fact, the only positive aspect for plaintiffs is that the Court did not adopt the more disadvantageous pure pretext-plus approach. The middle-ground approach takes the sword out of the plaintiff's hand: once the defendant articulates a nondiscriminatory reason, the trier of fact is not required, based upon proof of pretext, to conclude that discrimination occurred,<sup>212</sup> and thus, the plaintiff

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<sup>209</sup> Michael J. Lambert, Note, *St. Mary's Honor Center v. Hicks: The "Pretext-Maybe" Approach*, 29 NEW ENG. L. REV. 163 (1994).

<sup>210</sup> EEOC: ENFORCEMENT GUIDANCE ON *ST. MARY'S HONOR CENTER V. HICKS*, *supra* note 203, at F-2; *see also* *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994) (explaining Court rejected pretext-plus approach in favor of version of pretext-only earlier adopted by Seventh Circuit); *Brookins, supra* note 69, at 964-65 (noting ambiguous language in *Hicks* and concluding Court adopted approach between pretext-plus and pretext-only); *Odell, supra* note 208, at 1269-76, 1282 (discussing support for "permissive inference" interpretation of *Hicks*); *cf. Marcantel v. State Dep't of Transp. & Dev.*, 37 F.3d 197, 200 (5th Cir. 1994) (asserting Court decided pretext alone is insufficient to satisfy burden at third stage of *McDonnell Douglas* analysis).

<sup>211</sup> *See Hicks*, 113 S. Ct. at 2749 ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."); *see also* *Brookins, supra* note 69, at 964-65 (detailing extent of "plus" evidence needed to satisfy *Hicks* standard). *But see* *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, 542 (5th Cir. 1994) (labelling foregoing language in *Hicks* as "obvious[] dicta"), *reh'g en banc granted*, 49 F.3d 127 (5th Cir. 1995).

<sup>212</sup> *See Calloway, supra* note 85, at 1001 (asserting trier of fact is no longer required to find discrimination even if plaintiff proves pretext and presents additional evidence); *cf. Jones, supra* note 7, at 2358 (arguing pretext evidence is interpreted as proving only that employer either lied or erred, and comparative evidence is "quintessentially equivocal"); *The Supreme Court—Leading Cases, supra* note 85, at 349 (positing that without direct evidence and without presumption of discrimination based on proof of pretext, plaintiff's chances of winning depend on whether factfinder believes discrimination is prevalent in employment decisions).

has only a scintilla of a chance of winning at the third stage without a trial.<sup>213</sup> Even worse for plaintiffs, the ambiguities in *Hicks* have spawned even more deleterious progeny in the lower courts.

Struggling with *Hicks*'s evidentiary requirements for plaintiffs attempting to satisfy their burden at the third stage,<sup>214</sup> some lower courts not only have taken the sword from plaintiffs, but also have allowed defendant employers to brandish the swords of summary judgment and judgment as a matter of law more freely.<sup>215</sup> Indeed, Justice Souter predicted this result in his dissent in *Hicks* because he was aware that the majority's opinion was susceptible of interpretation as adoption of a pure pretext-plus approach.<sup>216</sup> Thus, the notion of pretext-plus has crept back into some post-*Hicks* cases discussing the standard for summary judgment and judgment as a matter of law, with some courts requiring evidence in addition to that used to establish the prima facie case and to demonstrate pretext.<sup>217</sup>

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<sup>213</sup> Brookins, *supra* note 69, at 957.

<sup>214</sup> This issue may be framed as determining the type and quantity of "plus evidence" required. *Id.* at 959.

<sup>215</sup> See generally Mark S. Dichter & Debra L. Casey, *Summary Judgment in Employment Cases*, in LITIGATING EMPLOYMENT DISCRIMINATION CASES 1 (P.L.I. Litig. & Admin. Practice Course Handbook Series No. 522, 1995) (surveying post-*Hicks* summary judgment decisions); Zeldin, *supra* note 19, at 933-34. Both motions for summary judgment and judgment as a matter of law test the sufficiency of the plaintiff's evidence. See Lambert, *supra* note 209, at 200-04 (giving examples of court decisions addressing plaintiffs' burden after *Hicks*); cf. CHARLES A. WRIGHT ET AL., FED. PRAC. & PROC. § 2713.1, at 613 (1969) ("The directed verdict motion rests on the same theory as a Rule 56 motion . . .").

<sup>216</sup> *Hicks*, 113 S. Ct. at 2762 (Souter, J., dissenting) ("This 'pretext-plus' approach . . . would result in summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence.").

<sup>217</sup> This is what Professor Malamud labels the "judgment for defendant required" position. Malamud, *supra* note 134, at 2306. See, e.g., *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, 542 (5th Cir. 1994) (concluding Court in *Hicks* rejected pretext-only and holding that plaintiff cannot avoid judgment as matter of law by establishing prima facie case and creating genuine issue of fact on pretext), *reh'g en banc granted*, 49 F.3d 127 (5th Cir. 1995), *reh'g en banc*, 69 Fair Empl. Prac. Cas. (BNA) 1720 (5th Cir. 1996). The Fifth Circuit, in the rehearing en banc, decided that *Hicks* does not provide a categorical answer to when evidence establishing a prima facie case and pretext is sufficient to withstand a motion challenging the sufficiency of the evidence. *Rhodes*, 69 Fair Empl. Prac. Cas. (BNA) at 1722. Rather, the court stated, such evidence may be sufficient in some cases and insufficient in others. *Id.* at 1722-23. Evaluating the case before it, the Fifth Circuit, overturning the panel's decision, held that the district court properly denied the defendant's motion for

The Equal Employment Opportunity Commission (EEOC) has taken the position that the Court rejected the pretext-plus approach in *Hicks* and that establishment of a prima facie case and evidence of pretext is sufficient to withstand a motion for summary judgment.<sup>218</sup> Even courts that accept the foregoing interpretation of *Hicks* disagree whether sufficient evidence of pretext must be adduced in addition to that presented to make out the prima facie case, or whether the prima facie evidence can serve double duty and alone raise a genuine issue of material fact on pretext.<sup>219</sup>

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JNOV. *Id.* at 1725.

A federal district court applying the Fifth Circuit panel's interpretation of *Hicks* to consideration of a defendant's motion for summary judgment described the third stage of the *McDonnell Douglas* analysis as two-pronged. *Deaver v. Texas Commerce Bank, N.A.*, 886 F. Supp. 578, 583 (E.D. Tex. 1995). The court concluded that although the plaintiff had established a genuine issue of material fact on the falsity of the defendant's reasons, she had not established a genuine issue regarding the "second prong of the third step"—proof that the discriminatory reasons were the real reasons. *Id.* The court acknowledged that the plaintiff's interpretation of *Hicks* was a "logical reading" of the case, but it explained that the Fifth Circuit in *Rhodes* declared the language on which plaintiff relied to be dicta. *Id.* at 583 n.4. The district court further opined that "[t]he Fifth Circuit's interpretation [of *Hicks*] . . . makes it difficult for a plaintiff to survive summary judgment without compelling evidence evoking the defendant's discriminatory intent. This creates a truly formidable burden upon a plaintiff." *Id.* This burden should be ameliorated by the Fifth Circuit's decision in the rehearing en banc of *Rhodes*.

<sup>218</sup> EEOC: ENFORCEMENT GUIDANCE ON *ST. MARY'S HONOR CENTER V. HICKS*, *supra* note 203, at F-3; see also *EEOC v. IPMC, Inc.*, 156 F.R.D. 163, 164 (E.D. Mich. 1994). In its original decision in *IPMC*, the court construed *Hicks* as requiring a plaintiff in a Title VII or ADEA claim to establish both that a genuine issue of material fact exists as to whether a defendant's articulated reason for its adverse employment action is false and whether the true reason is discriminatory. *EEOC v. IPMC, Inc.*, 834 F. Supp. 200, 205-06 (E.D. Mich. 1993). In vacating its earlier decision, the court stated it had been convinced by the EEOC that it had read *Hicks* too broadly. The court then explained its new understanding of *Hicks*:

*Hicks*, in the context of an age discrimination claim, stands for the proposition that once a defendant articulates its justification for an employment action, the trier of fact then must proceed to the ultimate question of whether plaintiff has proven that the defendant has intentionally discriminated against him because of his age.

*IPMC*, 156 F.R.D. at 164. But see *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890-91 (9th Cir. 1994) (rejecting proposition that prima facie case is sufficient to survive motion for summary judgment).

<sup>219</sup> Compare *Wallis*, 26 F.3d at 890-91 ("[W]hen evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case based on a *McDonnell Douglas* type presumption." (emphasis in original)) with *Bragalone v. Kona Coast Resort Joint Venture*, 866 F. Supp. 1285, 1292 (D. Haw. 1994) (following *Wallis* but holding same direct evidence used to establish prima facie case may be considered in determining whether

Thus, divergent interpretations of *Hicks* and uncertainties regarding the type of evidence necessary have placed plaintiffs asserting disparate treatment claims in jeopardy of having their cases struck down before trial or without resolution by the factfinder.<sup>220</sup>

Viewed in isolation, *Hicks* looks bad enough for plaintiffs proceeding under the employment discrimination statutes. Viewed in light of the progression of cases which over the last two decades have eroded plaintiffs' rights under those laws, it looks worse. *Hicks* substantially surpasses *Furnco* in terms of making it difficult for plaintiffs to recover in disparate treatment cases. In *Furnco*,<sup>221</sup> the Court eliminated the second stage of the *McDonnell Douglas* analysis as a point at which plaintiffs are likely to win treatment cases. Although the *Furnco* Court, by emphasizing that a plaintiff could still win by proving pretext,<sup>222</sup> sought to temper the negative effect that its decision had on a plaintiff's chance of prevailing under the *McDonnell Douglas* analysis, fifteen years later in *Hicks* the Court further stripped the *McDonnell Douglas* framework of its viability as a means for plaintiffs to prove intentional discrimination.<sup>223</sup>

To say that *Hicks* was "wrongly" decided is perhaps an overstatement if the decision is evaluated on the majority's terms. As the majority noted, lower courts had differed on resolution of the pretext-only versus pretext-plus issue.<sup>224</sup> Although a majority of lower courts apparently followed the pretext-only approach,<sup>225</sup>

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plaintiff has raised triable issue of fact on pretext).

<sup>220</sup> See Brookins, *supra* note 69, at 957 ("Under the *Hicks* standard, a plaintiff who would have easily reached a fact-finder during the last twenty years will possibly become easy prey for an employer's motion for either summary judgment or directed verdict, even if the employer has virtually no defense for the adverse action." (footnote omitted)). A plaintiff's predicament is probably no greater in courts that followed the pretext-plus approach before *Hicks*. It will likely be greater, however, in courts that followed the pretext-only approach before *Hicks*.

<sup>221</sup> *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978); see also *supra* notes 136-149 and accompanying text (discussing *Furnco*).

<sup>222</sup> *Furnco*, 438 U.S. at 578.

<sup>223</sup> Brookins, *supra* note 69, at 978-79 (explaining employers may escape summary judgment or directed verdicts on "the flimsiest of grounds"—facially legitimate reasons that need not be true).

<sup>224</sup> *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2750 (1993); see also Lancot, *supra* note 202, at 71-91 (discussing adoption of each approach among courts).

<sup>225</sup> Brookins, *supra* note 69, at 946; Lancot, *supra* note 202, at 71-81; *The Supreme Court—Leading Cases*, *supra* note 85, at 342.

that fact hardly seems a basis on which to conclude the Supreme Court reached the wrong resolution of the issue.<sup>226</sup> In short, the Court in *Hicks* did no great violence to either prior case law<sup>227</sup> or to Rule 301 of the Federal Rules of Evidence (regarding the effect of presumptions), the latter which figured prominently in the majority's opinion.<sup>228</sup> However, the result in *Hicks* can be evaluated in terms of the policies it promotes and the policies it subordinates and, under those terms, the Court did not decide the case correctly.<sup>229</sup>

The purpose of the *McDonnell Douglas* analysis is to assist plaintiffs in presenting circumstantial evidence of discrimination.<sup>230</sup> Subjective intent is a difficult thing to prove,<sup>231</sup> and without some objective employer manifestations acting as a proxy,

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<sup>226</sup> For example, a majority of the federal courts of appeals adopted the *Summers* approach to after-acquired evidence, but the Supreme Court in *McKennon* rejected (somewhat) that approach as wrong. See *infra* notes 273-326 and accompanying text (discussing *McKennon* and pre-*McKennon* approaches to after-acquired evidence).

<sup>227</sup> The majority and dissent, of course, do interpret language in prior cases differently, but the split in the circuits indicates that this was not a new debate.

<sup>228</sup> Calloway, *supra* note 85, at 1002. But see Malamud, *supra* note 134, at 2262 & n.110 (explaining that Rule 301 did not require result reached in *Hicks*).

<sup>229</sup> Professor Malamud disagrees. She argues that the Court correctly decided *Hicks*. Malamud, *supra* note 134, at 2237. She contends that the "nostalgic" critique of the *McDonnell Douglas* line of cases is flawed. *Id.* at 2232-37. That critique, she argues, fails to identify "an essentially conservative foundation" in the cases. *Id.* at 2266. Malamud sees in *McDonnell Douglas* and its progeny, efforts by the Court to insulate the disparate treatment cases from the pro-plaintiff innovations in disparate impact cases. *Id.* at 2263-66. Accordingly, she does not find in the *McDonnell Douglas* line of cases a pro-plaintiff policy "needed to justify a mandatory pro-plaintiff presumption that is insufficiently supported by the weight of the evidence." *Id.*

<sup>230</sup> Brookins, *supra* note 69, at 980-81; cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.").

<sup>231</sup> See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (recognizing difficulty of determining employer's motivation, but emphasizing necessity of inquiry under Title VII). The Court pulled a quote from antiquity to assure courts that the task is not impossible:

"The state of a man's mind is as much a fact as the state of his digestion.

It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

*Id.* at 716-17 (quoting *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (1885) (Bowen, L.J.)); see also Jones, *supra* note 7, at 2351 (asserting subjective explanations escape scrutiny).

it is virtually impossible to prove.<sup>232</sup> Moreover, an employer is in a better position than a plaintiff-employee to know and explain why the employer acted as it did.<sup>233</sup> Thus, the *McDonnell Douglas* analysis was developed to provide that proxy.<sup>234</sup> Courts were willing to make “the basic assumption” that, absent a credible explanation of a legitimate reason, adverse treatment of members of protected groups was more likely than not caused by intentional discrimination.<sup>235</sup> The decision to make that assumption was based on policy—the policy of federal employment discrimination law.<sup>236</sup> In *Hicks*, a majority of the Court was no longer willing to make that assumption. In effect, the Court said the fact that an employer gives a pretextual reason for its actions does not necessarily mean that it took those actions because of discriminatory intent.<sup>237</sup>

*b. The Triumph of Employment at Will, Again.* Why would the Court adopt an interpretation of the *McDonnell Douglas* analysis that is contrary to the policies of federal employment discrimination law? Why is a majority of the Court no longer willing to make the “basic assumption”? The Court itself obliquely provides that

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<sup>232</sup> Consider, for example, the concept of intent in the context of intentional torts. It is hornbook law that the prima facie element of intent may be established either by showing that the tortfeasor had the purpose of causing the result or that the tortfeasor knew to a substantial certainty that her act would cause the result. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 33-34 (5th ed. 1984). Because the subjective purpose is difficult to prove absent an admission, the more objective alternative of “knowledge to a substantial certainty” serves as a proxy.

<sup>233</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977).

<sup>234</sup> In evaluating *Hicks*, I am reminded of a pre-*Hicks* conversation I had with a colleague who teaches and writes in the area of corporate law. He had been reading about the *McDonnell Douglas* analysis and wanted to discuss it with me. When we discussed the pretext stage, I explained that the plaintiff's burden could be interpreted as either proving pretext or proving pretext for discrimination. He responded that “pretext for discrimination” could not be the proper interpretation because then the *McDonnell Douglas* analysis would mean nothing; it would not provide a proxy for intentional discrimination. My colleague was quite surprised when the *Hicks* decision was rendered.

<sup>235</sup> Calloway, *supra* note 85, at 997-98 (tracing this “basic assumption” to Court's explanation of why establishing prima facie case raises rebuttable presumption of intentional discrimination). See generally Birnbaum, *supra* note 205, at 447 (explaining rationale for development of *McDonnell Douglas* analysis).

<sup>236</sup> Brookins, *supra* note 69, at 983-84.

<sup>237</sup> See Jones, *supra* note 7, at 2356 (“For the Court, the fact that the defendant is a liar does not mean that he is a bigot or a discriminator.”).



answer in *Hicks*. One can see the iron fist of policies and objectives that the majority most highly values under the velvet glove<sup>238</sup> of one statement: "We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated."<sup>239</sup>

On first reading, that statement seems to be an innocuous truism. Under closer scrutiny, however, one should question the function of that truism in the majority's opinion. The Court is saying that it is powerless to impose liability on employers, who have free reign to act under their prerogatives and the employment-at-will doctrine, unless they are found to have violated federal employment discrimination law. Of course, the very issue in the case is, when must the fact finder *be required to find* discrimination *as a matter of law*.

Thus, the Court's circuitous statement is a poor attempt to justify its holding in *Hicks* as the correct and inevitable interpretation of the third stage of the *McDonnell Douglas* analysis. In truth, the statement reveals that the Court chose not to exercise its power by requiring the fact finder to find discrimination when plaintiffs prove pretext, because the Court values employment at will more highly than employment discrimination law and its underlying policies.

Although the majority did not explicitly articulate its subordination of employment discrimination law and its policies to the putatively uncontrollable force of employment at will, neither did it mask that subordination well. Indeed, the dissent exposed the majority's ordering of policies, discerning "no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of

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<sup>238</sup> The "fist inside the velvet glove" metaphor is borrowed from Justice Harlan's opinion in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). In that case, the Court used the metaphor to explain how an employer's announcement during a union organizing campaign that it would provide improved benefits could actually be a veiled threat in violation of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1988), because employees would understand that the source of the benefits also could withhold them in the future. *Id.* at 409.

<sup>239</sup> *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2751 (1993).

discrimination who do not happen to have direct evidence of discriminatory intent.”<sup>240</sup>

Several *Hicks* commentators have posited that although the treatment of presumptions and the standard for judgments as a matter of law would be unobjectionable in general civil litigation, they are inappropriate in an action involving legislation intended to implement social policies, such as those underlying discrimination law.<sup>241</sup> Its protestations to the contrary notwithstanding, the Court was not without power to adopt a pretext-only interpretation of the third stage of *McDonnell Douglas*. Instead, the Court’s choice of an interpretation in *Hicks* was driven by policies and values other than those embodied in employment discrimination law.<sup>242</sup>

The Supreme Court’s meek admission of powerlessness to control employment at will, while patently incorrect, has a long lineage in the Court’s employment discrimination decisions. The admission traces back to *Furnco*, in which the Court warned lower courts that they were competent neither to evaluate employers’ business practices nor to suggest substitute practices that would be less discriminatory.<sup>243</sup> In *Hicks*, the Court honed this language and articulated more clearly its powerlessness to prevent employment

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<sup>240</sup> *Id.* at 2766 (Souter, J., dissenting); see also Janice R. Bellace, *The Supreme Court’s 1992-1993 Term: A Review of Labor and Employment Law Cases*, 9 LAB. LAW. 603, 625-26 (1993) (attributing majority’s and dissent’s different interpretations of third stage of *McDonnell Douglas* to majority’s focus on employment-at-will doctrine and dissent’s focus on fairness).

<sup>241</sup> *E.g.*, Brookins, *supra* note 69, at 953; *The Supreme Court—Leading Cases*, *supra* note 85, at 349, 351.

<sup>242</sup> Explaining why the Court attached a presumption of discrimination when a plaintiff establishes a prima facie case under *McDonnell Douglas*, Blumoff and Lewis state:

Title VII’s very existence as a legislative statement of social policy demands this presumption. . . . Presumptions . . . necessarily reflect normative decisions. In Title VII the prescription is to eliminate discrimination in the workplace, but that goal leaves open critical overriding and interrelated issues. What kinds of discrimination should be eliminated, how, and at what cost? That presumptions mirror social values does not mean that only normative considerations apply to our decisions to create presumptions. It does insist, however, that public values are a necessary component of that decision.

Blumoff & Lewis, *supra* note 6, at 10-11.

<sup>243</sup> See *supra* notes 141-146 and accompanying text (discussing *Furnco*’s admonition to courts not to second-guess employers).

at will from masking employment discrimination. This proclamation of judicial weakness would become even stronger in *McKennon*.<sup>244</sup>

The practical effect of *Hicks* is likely to be that victims of discrimination will sue less often, and those who do sue are more likely to settle for less or to lose their cases.<sup>245</sup> Thus, employment at will subordinates employment discrimination law at two levels. First, the policies of management prerogative prevail over employment discrimination policies in *Hicks*. Second, because of the effect of *Hicks* on potential plaintiffs, employers are able to operate almost as though employment discrimination law does not impinge on employment at will at all.<sup>246</sup> *Hicks* was recognized as a significant defeat by supporters of employment discrimination law, and although several bills were introduced in Congress in 1993 to overturn the decision,<sup>247</sup> none passed.

c. *Treatment of "Liars" and the Coming of McKennon*.<sup>248</sup> The majority and the dissent in *Hicks* engaged in a colloquy regarding whether employers whose reasons are determined to be pretextual are "liars," and whether that issue should affect the Court's interpretation of the third stage of *McDonnell Douglas*. The dissent

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<sup>244</sup> See *infra* notes 273-326 and accompanying text (discussing *McKennon*).

<sup>245</sup> Culp, *supra* note 107, at 1010.

<sup>246</sup> See Jones, *supra* note 7, at 2358 (arguing that, because *Hicks* precludes comparative and pretext evidence as necessarily proving discrimination, Court has "close[d] the circle that defines a sphere of autonomy and sovereignty for the employer to decide whom to hire, fire, or promote").

<sup>247</sup> S. 1776, 103d Cong., 1st Sess. (1993); H.R. 3680, 103d Cong., 1st Sess. (1993); H.R. 2787, 103d Cong., 1st Sess. (1993); H.R. 2867, 103d Cong., 1st Sess. (1993). The text of H.R. 2787 and H.R. 2867 is reproduced in Brookins, *supra* note 69, at 943 n.17. S. 1776 and H.R. 3680 were companion bills introduced in the Senate by Senator Howard Metzenbaum and in the House by Representative Major Owens. *Congress Moves to Overturn Hicks Ruling*, DAILY LAB. REP., Dec. 9, 1993, at A-16. The Clinton Administration endorsed S. 1776, the Civil Rights Standards Restoration Act, which the Justice Department characterized as "a carefully drafted, straightforward reversal of [*Hicks*]." Letter from Assistant Att'y Gen. Sheila F. Anthony to Sen. Edward M. Kennedy on S. 1776 (Sept. 13, 1994), reprinted in DAILY LAB. REP., Oct. 7, 1994, at E-1 to E-3. However, the bill did not make it out of committee. Malamud, *supra* note 134, at 2236 n.28.

<sup>248</sup> [T]he Court frequently finds itself in areas whose full contours are revealed only as case law expands. Still, shadows from the unfolding landscape can be seen, and in dicta the Court indicates its anticipated course. Thus, by the time the foreseen issues actually reach the Court, the decisions are fairly predictable.

Blumoff & Lewis, *supra* note 6, at 73.

repeatedly referred to employers whose reasons are found to be pretextual as “liars”<sup>249</sup> and denounced the majority for adopting an approach that rewards liars.<sup>250</sup>

The majority rejected the dissent’s labelling of all employers whose reasons are not believed as “liars”<sup>251</sup> but conceded that some employers will be lying when they offer legitimate reasons for their employment decisions.<sup>252</sup> The majority expressed surprise, however, that the dissent would impose Title VII liability as punishment for an employer’s lying because Title VII is not intended to punish perjury.<sup>253</sup> Moreover, noted the majority, the dissent’s “judgment-for-lying” scheme is not fair or symmetrical because, in part, “the plaintiff is permitted to lie about absolutely everything without losing a verdict he otherwise deserves.”<sup>254</sup> The majority’s pronouncements provide a solid basis for comparing the Court’s treatment of employment at will and employment discrimination law after its decision in *McKennon*, as that case addresses issues arising when employees are liars or malefactors.

Interestingly, during the period between *Hicks* and *McKennon*, the Court decided a case under the National Labor Relations Act involving an employee who lied to his employer and to an administrative law judge. In *ABF Freight Sys., Inc. v. NLRB*,<sup>255</sup> the Court considered the remedy due an employee who had been discharged by his employer for filing an unfair labor practice charge against the employer and for participating in the grievances of other discharged employees.<sup>256</sup> The employee had lied to his employer about the reason he was late for work on the occasion leading to his termination and then repeated the lie in a hearing

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<sup>249</sup> *St. Mary’s Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2764 & nn.12-13 (1993) (Souter, J., dissenting).

<sup>250</sup> *Id.* at 2764 n.13 (“Under the majority’s scheme, the employer who is caught in a lie, but succeeds in injecting into the trial an unarticulated reason for its actions, will win its case and walk away rewarded for its falsehoods.”).

<sup>251</sup> *Id.* at 2754 (“To say that [a] company which in good faith introduces such testimony . . . becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd.”).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 2755.

<sup>255</sup> 114 S. Ct. 835 (1994).

<sup>256</sup> *ABF Freight Sys., Inc.*, 304 N.L.R.B. 585, 589, 591 (1991). The discharge violated §§ 8(a)(1), (3) and (4) of the NLRA, 29 U.S.C. §§ 158(a)(1), (3) & (4) (1988).

before an administrative law judge.<sup>257</sup> Having concluded that the employer discriminatorily discharged the employee in violation of the NLRA, the National Labor Relations Board ordered the make-whole relief of immediate reinstatement of the employee to his job with full backpay,<sup>258</sup> and the Tenth Circuit enforced the Board's order.<sup>259</sup> The Supreme Court granted certiorari on the following question: "Does an employee forfeit the remedy of reinstatement with backpay after the Administrative Law Judge finds that he purposefully testified falsely during the administrative hearing?"<sup>260</sup>

The Court affirmed the Tenth Circuit, thus granting enforcement of the Board's order, but the Court's opinion and the concurring opinions suggested the Court was doing so based strictly on the deference due the Board as the NLRA's administering and interpreting agency.<sup>261</sup> Although expressing concern over rewarding a plaintiff's perjury, the Court acknowledged that some of the employer's testimony also had been discredited by the administrative law judge.<sup>262</sup> Thus, the Court reasoned, it would not be fair to punish the employee for his lies by denying his remedies, as such a decision also would indirectly reward the employer's lack of candor.<sup>263</sup>

The most notable aspect of *ABF Freight*, in the aftermath of *Hicks* and as a prelude to *McKennon*, is Justice Scalia's grudging concurrence. Justice Scalia, the author of the *Hicks* majority opinion, did not care for the lies of the employee at all, nor was he pleased by the Board's failure to deny, or at least to consider denying, backpay and reinstatement.<sup>264</sup> Justice Scalia accused the Board of "an unseemly toleration of perjury."<sup>265</sup> After a scathing attack on the Board's decision, in which he provided instruction on the equitable doctrine of unclean hands, Justice

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<sup>257</sup> *ABF Freight*, 114 S. Ct. at 837.

<sup>258</sup> *ABF Freight*, 304 N.L.R.B. at 591.

<sup>259</sup> *Miera v. NLRB*, 982 F.2d 441 (10th Cir. 1992).

<sup>260</sup> *ABF Freight*, 114 S. Ct. at 839 n.8.

<sup>261</sup> *Id.* at 839-40, 842.

<sup>262</sup> *Id.* at 840.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 842 (Scalia, J., concurring).

<sup>265</sup> *Id.* at 841.

Scalia concluded, "I concur in the judgment of the Court that the NLRB did nothing against the law, and regret that it missed an opportunity to do something for the law."<sup>266</sup>

One may be forgiven for asking why the author of the *Hicks* majority opinion would speak in favor of punishing lying employees by depriving them of their remedies when they have been discriminated against. After all, in *Hicks* Justice Scalia and the majority had been unwilling to equate an employer's presentation of a pretextual reason for its adverse employment action with a coverup for discriminatory motivation. In addition, Justice Scalia and the *Hicks* majority rejected the dissent's label of "liar" for an employer whose articulated reason was not believed by the factfinder.<sup>267</sup> Yet, in *ABF Freight* Justice Scalia asserted that the Court erred by comparing the "ABF managers' disbelieved testimony concerning motivations for firing and [the employee's] crystal-clear lie that he was where he was not."<sup>268</sup> Justice Scalia's distinction, which would avoid inconsistency between his *Hicks* and *ABF Freight* opinions, raises an interesting point that goes back to *Hicks*.

The difference between the "crystal-clear lie" and the "disbelieved testimony concerning motivations" is that the former deals with the state of objective facts, whereas the latter deals with subjective intent or motivation. A crystal-clear lie can be objectively disproved, as it was in *ABF Freight* by a deputy sheriff who testified as to what he saw when he stopped the employee's car.<sup>269</sup> Testimony concerning motivations cannot be so easily disproved, however, because we cannot look into an employer's mind and capture the thought processes at the time an employment decision is made. This is precisely why circumstantial evidence is so important to plaintiffs and why many think that a plaintiff's demonstration of pretext at the third stage of the *McDonnell Douglas* analysis should be sufficient to conclude as a matter of law that an employer's reasons were discriminatory.

When, if ever, does the disbelieved testimony become a lie, or come close enough to a lie, so as to justify visiting adverse conse-

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<sup>266</sup> *Id.* at 843.

<sup>267</sup> See *supra* note 251 and accompanying text (discussing *Hicks* majority's denigration of dissent's characterization of lying employers as "absurd").

<sup>268</sup> *ABF Freight*, 114 S. Ct. at 842 (Scalia, J., concurring).

<sup>269</sup> *Id.* at 837 n.3.

quences on the employer proffering the disbelieved testimony? Is the heart of the difference really that, while both employees and employers lie, employers should not be punished for those lies connected to terminations and other adverse employment actions because employers can terminate for good reasons, bad reasons, or no reason at all?<sup>270</sup> Some commentators predicted that *ABF Freight* provided some indication of how the Court would decide the after-acquired evidence issue before it in *McKennon*.<sup>271</sup> I think it did.

2. *McKennon: Gutting the Remedies.*

*It's because he stays out there, right under the window, hammering and sawing on that . . . box. Where she's got to see him. Where every breath she draws is full of his knocking and sawing where she can see him saying See. See what a good one I am making for you. I told him to go somewhere else. I said Good God do you want to see her in it.*<sup>272</sup>

In *McKennon v. Nashville Banner Publishing Co.*,<sup>273</sup> the unanimous Court finally purported to be doing something good for employment discrimination law by deciding the employer liability issue in after-acquired evidence cases in a way that favors the policies underlying that law. Upon closer examination of the Court's opinion, however, one discovers a different message in the Court's holding on the issue of limitations on liability: the Court continues creating a coffin for employment discrimination law and

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<sup>270</sup> This is the very rationale some courts employ when denying an employee's claim for relief in a fraud-in-termination case. For example, in *Stromberger v. 3M Co.*, 990 F.2d 974 (7th Cir. 1993), the plaintiff sued his former employer, claiming that the employer induced him to accept an early severance plan through fraudulent misrepresentations regarding its expectations of him if he remained in his job and regarding the outcome should he fail to meet those expectations. *Id.* at 976. The Seventh Circuit held that the plaintiff could not establish the prima facie elements of fraud: the alleged misrepresentations caused no damage because, under the employment-at-will doctrine, the employer could have fired him for any reason or no reason. *Id.* at 977.

<sup>271</sup> *E.g.*, Charles S. Mishkind, *The Use of "After-Acquired" Knowledge of Either Prehire Misrepresentations or Post-hire Misconduct in Employment Litigation and Arbitration*, in CONTEMPORARY ISSUES, *supra* note 205, at 3, 18-19.

<sup>272</sup> WILLIAM FAULKNER, AS I LAY DYING 14 (Random House 1964) (1930).

<sup>273</sup> 115 S. Ct. 879 (1995).

its policies. Construction has continued for many years, and now the coffin is almost complete. *McKennon* is, perhaps, the most definitive subordination of federal employment discrimination law to the employment-at-will doctrine to date.

*a. The Decision and Analysis.*

*i. The Decision.* In *McKennon*, the plaintiff was a 62 year-old secretary who, after working for the defendant for almost forty years, was terminated in 1990, allegedly pursuant to a reduction in force.<sup>274</sup> *McKennon* filed an action alleging she was discharged because of her age in violation of the ADEA and the Tennessee Human Rights Act.<sup>275</sup> During the plaintiff's deposition, the defendant learned that while the plaintiff was still working as a secretary for the defendant, she had copied and removed from its office several confidential documents.<sup>276</sup> *McKennon* explained her actions as based on her concerns for job security: she copied the documents to give her "insurance" and "protection" against discharge.<sup>277</sup> Two days after the revelations in the deposition, the defendant sent *McKennon* a letter notifying her again of her termination, this time based on her actions regarding the documents, conduct which violated her job responsibilities.<sup>278</sup> Furthermore, the letter advised *McKennon* that had the defendant known of her actions, it would have terminated her immediately for that reason.<sup>279</sup> The defendant then filed a motion for summary judgment, supported by an affidavit from the company president in which he asserted that the Nashville Banner would have terminated *McKennon* at once had it learned of her actions before her (first) discharge occurred.<sup>280</sup> The district court granted the

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<sup>274</sup> *McKennon v. Nashville Banner Publishing Co.*, 797 F. Supp. 604, 605 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 605-06. The documents were the following: a Nashville Banner Fiscal Period Payroll Ledger; a Nashville Banner Publishing Co., Inc., Profit and Loss Statement; an agreement between the Nashville Banner and one of its managing employees; and a few notes and memoranda. *Id.*

<sup>277</sup> *Id.* at 606. Ms. *McKennon* was concerned that she would be discharged because of her age, and she thought these documents regarding the employer's financial condition might help her. *McKennon*, 115 S. Ct. at 883.

<sup>278</sup> *McKennon*, 115 S. Ct. at 883.

<sup>279</sup> *Id.*

<sup>280</sup> *McKennon*, 797 F. Supp. at 608.



motion under the rule, established in *Summers v. State Farm Mutual Automobile Insurance Co.*,<sup>281</sup> that "after-acquired" evidence of misconduct that would have resulted in discharge of an employee precludes recovery by that employee in an action under employment discrimination statutes.<sup>282</sup>

On appeal, the Sixth Circuit affirmed, repeating the circuit's adherence to the *Summers* rule.<sup>283</sup> The court rejected the plaintiff's attempt to distinguish her case based on the connection between her misconduct and her discrimination claim,<sup>284</sup> instead holding that the only issue in an after-acquired evidence case is "whether the employer would have fired the plaintiff employee on the basis of the misconduct had it known of the misconduct."<sup>285</sup>

The Supreme Court granted certiorari in *McKennon* to resolve the split in the circuits on the after-acquired evidence issue it had attempted to resolve two years earlier.<sup>286</sup> In a unanimous opinion, the Court reversed the Sixth Circuit. First, the Court proclaimed the purpose of the ADEA and Title VII ("the elimination of discrimination in the workplace")<sup>287</sup> and the objectives of these statutes (deterrence and compensation).<sup>288</sup> Next, the Court acknowledged the role of private litigants in effecting these statutory objectives.<sup>289</sup> Accordingly, the Court declared that to treat after-acquired evidence as precluding all relief would be inconsistent with this scheme of combatting discrimination.<sup>290</sup>

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<sup>281</sup> 864 F.2d 700 (10th Cir. 1988).

<sup>282</sup> *Id.* at 709. The Sixth Circuit had adopted the *Summers* rule in *Johnson v. Honeywell Info. Sys.*, 955 F.2d 409 (6th Cir. 1992).

<sup>283</sup> *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995).

<sup>284</sup> The court understood *McKennon*'s argument to be that because her misconduct was to prevent her employer from discriminating against her because of her age, the *Summers* rule should not apply. *Id.* at 543.

<sup>285</sup> *Id.*

<sup>286</sup> The Court had granted certiorari in a similar case in 1993, but the parties settled, and the case was dismissed. *Milligan-Jensen v. Michigan Tech. Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993).

<sup>287</sup> *McKennon*, 115 S. Ct. at 884 (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

The Court then turned its attention to *Summers* and explained that the Tenth Circuit's reliance in that case on *Mt. Healthy City School District Board of Education v. Doyle*<sup>291</sup> was misplaced because it ignored a significant difference between mixed-motives cases and after-acquired evidence cases: in mixed-motives cases, the employer actually knows of a legitimate, nondiscriminatory reason for terminating the employee *at the time* it makes the decision, whereas in after-acquired evidence cases the employer learns of the legitimate reason only *after* it takes the action.<sup>292</sup>

However, the Court had not finished its explication of after-acquired evidence by overruling *Summers*. The Court next embarked upon a discussion of how Title VII and the ADEA do not wholly supersede the legitimate prerogatives of employers.<sup>293</sup> Invoking language from *Price Waterhouse v. Hopkins*,<sup>294</sup> in which it most forcefully insisted that management prerogatives must be balanced against the rights created by discrimination law,<sup>295</sup> the Court focused on the legitimate rights of the employer that survived adoption of the employment discrimination statutes. The Court concluded that, in view of the balance between employers' prerogatives and the statutory rights of discrimination victims, after-acquired evidence may limit the remedies that a plaintiff can recover<sup>296</sup> if the employer can "establish that the wrongdoing was

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<sup>291</sup> 429 U.S. 274 (1977). In *Mt. Healthy*, the Supreme Court considered the claim of a teacher for whom the school board based a refusal to rehire on both a legitimate reason and a reason that violated his constitutional free speech rights. The Court held that causation would be evaluated in two stages. First, if the plaintiff could prove that the protected conduct of the employee was a "substantial factor" or a "motivating factor" in the employer's decision, the burden of proof would shift to the employer. *Id.* at 287. Second, if the employer proves that it would have reached the same decision for a legitimate reason, relief would not necessarily be proper. *Id.* Thus, the court adopted a "but-for" causation test for liability in mixed-motives cases.

<sup>292</sup> *McKennon*, 115 S. Ct. at 885.

<sup>293</sup> *Id.* at 886.

<sup>294</sup> 490 U.S. 228 (1989).

<sup>295</sup> See *supra* notes 160-168 and accompanying text (discussing Court's decision in *Price Waterhouse*).

<sup>296</sup> Regarding remedies, Title VII provides in part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without

of such severity" that the employer would have terminated the employee for that reason alone, had it known of the wrongdoing at the time of discharge.<sup>297</sup>

First, the Court concluded that, "as a general rule," reinstatement and front pay are not appropriate remedies, as ordering reinstatement would be "both inequitable and pointless."<sup>298</sup> Second, the Court held that backpay may be reduced, reasoning that when an employer discovers evidence that would have resulted in discharge, the Court "*cannot* require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit."<sup>299</sup> Thus, the Court adopted a "date-of-discovery" rule for reducing backpay. The Court left to lower courts the issue of whether other "extraordinary equitable circumstances" should be considered in determining the remedy in a particular case.<sup>300</sup>

Finally, the Court recognized that its holding might give employers an incentive to oppose discrimination claims by conducting extensive inquiries into employees' backgrounds and job performances.<sup>301</sup> Labelling this a "not insubstantial" concern,<sup>302</sup> the

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back pay . . . , or any other equitable relief as the court deems appropriate. 42 U.S.C. § 2000e-5(g) (1988 & Supp. V 1993). The ADEA, at issue in *McKennon*, provides for similar remedies. Because the ADEA incorporates the remedial provisions of the Fair Labor Standards Act, it additionally provides for liquidated damages for willful violations. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (1991), amended Title VII and the ADA (and the Rehabilitation Act of 1973) to make compensatory and punitive damages available under a disparate treatment theory if the plaintiff cannot recover such damages under § 1981. 42 U.S.C. § 1981a(a), (b) (Supp. V 1993). Compensatory damages are available for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." § 1981a(b)(3). Punitive damages may be recovered if the plaintiff proves that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." § 1981a(b)(1). However, any compensatory and punitive damages award (excluding, of course, any such damages awarded under § 1981) will be capped, ranging from a low of \$50,000 to a high of \$300,000, depending on the number of employees employed by the defendant. § 1981a(b)(3).

<sup>297</sup> *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 886 (1995).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* (emphasis added).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 887.

<sup>302</sup> *Id.*

Court nevertheless disposed of the concern in summary fashion, opining that the authority of courts to award attorney's fees under the ADEA and the power to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure "will deter most abuses."<sup>303</sup>

Prior to the Court's decision in *McKennon*, a majority of the federal circuit courts considering the after-acquired evidence issue followed the *Summers* rule. The Fourth,<sup>304</sup> Sixth,<sup>305</sup> Eighth,<sup>306</sup> and Tenth<sup>307</sup> Circuits, and some panels of the Seventh Circuit,<sup>308</sup> followed the rule. The Third Circuit<sup>309</sup> and some panels of the Seventh Circuit<sup>310</sup> rejected the *Summers* rule's

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<sup>303</sup> *Id.*

<sup>304</sup> *E.g.*, *Smallwood v. United Air Lines*, 728 F.2d 614, 623-24 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984). *Smallwood* preceded *Summers* and was relied on by the Tenth Circuit in its *Summers* decision. One commentator considers it unclear whether the Fourth Circuit would have followed *Summers*. See Parker, *supra* note 120, at 404 n.4 (questioning Fourth Circuit's pre-*Summers* adherence to rule announced in that case and distinguishing *Smallwood* on ground that employer in *Smallwood* could easily prove it would have quickly discovered and acted upon after-acquired evidence if it had processed plaintiff's application). However, two post-*Summers* district court decisions in the Fourth Circuit found the *Summers* approach to be consistent with *Smallwood*. *Reigel v. Kaiser Found. Health Plan*, 859 F. Supp. 963, 976 (E.D.N.C. 1994); *Rich v. Westland Printers*, 63 Empl. Prac. Dec. (CCH) ¶ 42,856, at 78,730-31 (D. Md. 1993).

<sup>305</sup> *E.g.*, *Milligan-Jensen v. Michigan Tech. Univ.*, 975 F.2d 302, 304-05 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, and *cert. dismissed*, 114 S. Ct. 22 (1993); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 415 (6th Cir. 1992) (involving wrongful discharge claim rather than discrimination claim).

<sup>306</sup> *E.g.*, *Welch v. Liberty Mach. Works*, 23 F.3d 1403 (8th Cir. 1994). The Eighth Circuit's adherence to *Summers* was qualified by its refusal in *Welch* to grant summary judgment in favor of the employer based solely on the employer's assertions in an affidavit that it would not have hired, and would have fired, the plaintiff had it known of the information. The court stated that an employer "bears a substantial burden of establishing that the policy predated the hiring and firing of the employee in question and that the policy constitutes more than mere contract or employment application boilerplate." *Id.* at 1406. The court concluded that the employer's "self-serving" affidavit did not satisfy that heavy burden but did not decide that an unopposed employer affidavit could never satisfy the burden. *Id.*

<sup>307</sup> *E.g.*, *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 707 (10th Cir. 1988); *Jackson v. Integra, Inc.*, Nos. 92-5143, 92-5153, 1994 WL 379305, at \*\*2 (10th Cir. 1994).

<sup>308</sup> *E.g.*, *Washington v. Lake County*, 969 F.2d 250, 256 (7th Cir. 1992); see also *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1256 (7th Cir. 1990) (concluding plaintiff's misrepresentation of his academic credentials in seeking promotion precluded viable claim for disparate treatment or disparate impact); *infra* note 310 and accompanying text (discussing turbulent state of affairs in Seventh Circuit on after-acquired evidence issue).

<sup>309</sup> *E.g.*, *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1228 (3d Cir. 1994), *cert. granted and judgment vacated*, 115 S. Ct. 1397 (1995).

<sup>310</sup> *E.g.*, *Kristufek v. Hussmann Foodserv. Co.*, 985 F.2d 364, 369 (7th Cir. 1993). The Seventh Circuit panel reached its result in *Kristufek* without even citing *Washington* or *Gilty*, in which the circuit had held that after-acquired evidence of misrepresentation could bar recovery. To confuse matters further, neither *Washington* nor *Gilty* cited the Seventh

preclusion of all remedies, although both recognized that after-acquired evidence may affect the remedies available to the plaintiff. In addition, an Eleventh Circuit panel had rejected the *Summers* rule in *Wallace v. Dunn Construction Co.*,<sup>311</sup> and that decision became the battle standard of the many commentators decrying the remedy preclusion rule. However, before *McKennon* was decided, the Eleventh Circuit vacated its opinion and granted rehearing en banc in *Wallace*.

Notwithstanding the support for the *Summers* rule in most federal appellate courts, the Supreme Court's rejection of the rule was predictable and the only reasonable decision. The *Summers* rule was overwhelmingly criticized by commentators.<sup>312</sup> Most

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Circuit's earlier decision in *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989), which, while cognizant of *Summers*, refused to adopt its reasoning. See *Mardell*, 31 F.3d at 1227-28 n.11 (discussing Seventh Circuit's "bouncing back and forth between the two camps for a while"); Dale R. Crider, *Dishonesty in the Employment Relationship*, 7 CHI. B. ASS'N REC. 16, 17 (Sept. 1993) (discussing Seventh Circuit's mysterious turnaround in *Kristufek*). The Eighth Circuit in *Welch* cited *Washington* for the proposition that the Seventh Circuit followed the majority approach of barring recovery in cases of after-acquired evidence. *Welch*, 23 F.3d at 1405.

<sup>311</sup> 968 F.2d 1174, 1180 (11th Cir. 1992) (holding evidence of employee's application fraud, discovered after filing of suit, could not serve as legitimate cause for terminating employee and arguing that "*Summers* rule is antithetical to the principal purpose of Title VII . . ."), *reh'g en banc granted and opinion vacated*, 32 F.3d 1489 (11th Cir. 1994).

<sup>312</sup> See, e.g., Davis, *supra* note 19, at 371 (criticizing *Summers* formulation); Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 148-50 (1993) (arguing against *Summers* rule and pointing out that enactment of Civil Rights Act of 1991 made that approach to after-acquired evidence completely untenable); Mitchell H. Rubinstein, *The Use of PredischARGE Misconduct Discovered After an Employees' [sic] Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 5 (1990) (noting "the unspoken evil of the after the fact defense is that some employers will be able to avoid total responsibility for their unlawful employment practices, such as employment discrimination"); Sprang, *supra* note 19, at 165 (decrying both remedy-preclusion approach of *Summers* and, to lesser extent, remedy-reduction approach adopted by Court in *McKennon*); Rebecca H. White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 54 (1993) (criticizing approach to after-acquired evidence defense emerging in lower courts); Mills, *supra* note 19, at 1526 (arguing *Summers* "is unjust and inconsistent with the purposes of both Title VII and the ADEA"); Parker, *supra* note 120, at 404 (noting *Summers* approach to after-acquired evidence is problematic); Zemelman, *supra* note 20, at 211 (calling for "bar [on] the use of after-acquired evidence to immunize employers in discrimination cases"). But see William M. Muth, Jr., Note, *The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992), 72 NEB. L. REV. 330, 332, 348 (1993) (noting wide support for *Summers* doctrine and need for "a system that keeps the essential element of the doctrine as

commentators and the federal appellate courts rejecting *Summers* pointed out that the *Summers* rule was based on an ill-conceived analogy to mixed-motives cases.<sup>313</sup> In mixed-motives cases, the employer was motivated by *both* legitimate and illegitimate reasons *at the time* of its decision. In after-acquired evidence cases, however, the employer necessarily could only have been motivated by the illegitimate reason. This point was made clear in *Price Waterhouse v. Hopkins*<sup>314</sup> when the Supreme Court, extending the mixed-motives analysis of *Mt. Healthy* to Title VII cases, stated, “[a]n employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision *if that reason did not motivate it at the time of the decision.*”<sup>315</sup>

ii. *Two Pre-McKennon Approaches to After-Acquired Evidence.* Although a general consensus existed among commentators that the remedy preclusion rule of *Summers* should be rejected, there was little agreement on the effect after-acquired evidence should have on remedies. Unfortunately, prior to *McKennon* the EEOC took the position that the proper approach to after-acquired evidence permitted its use to cut off backpay from the date of discovery and to preclude reinstatement or front pay. The EEOC further allowed compensatory damages for the period prior to the date of discovery and punitive damages consistent with the Civil Rights Act of 1991.<sup>316</sup> Under the EEOC’s approach, if the date of discovery was unknown, a date would be approximated and a corresponding reduction made in backpay and compensatory damages.<sup>317</sup>

The preclusion of reinstatement or front pay and the severance of backpay at the date of discovery had substantial support among

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established in *Summers*”).

<sup>313</sup> *Mardell*, 31 F.3d at 1229; *Wallace*, 968 F.2d at 1180; see also *supra* note 312 (citing sources criticizing *Summers*).

<sup>314</sup> 490 U.S. 228 (1989).

<sup>315</sup> *Id.* at 252 (emphasis added).

<sup>316</sup> EEOC: REVISED ENFORCEMENT GUIDE ON RECENT DEVELOPMENTS IN DISPARATE TREATMENT THEORY (1992) [hereinafter EEOC: REVISED ENFORCEMENT GUIDE], reprinted in 405 Lab. Rel. Rep. (BNA) 6915, 6926-28 (1995); see also *supra* note 296 (discussing 1991 Act’s provision for compensatory and punitive damages).

<sup>317</sup> EEOC: REVISED ENFORCEMENT GUIDE, *supra* note 316, at 6926.

commentators.<sup>318</sup> Advocates of this approach opposed requiring post-discovery backpay and reinstatement for the same reason: awarding such remedies trammels the legitimate prerogatives of the employer.<sup>319</sup> While admitting that after-acquired evidence discovered pursuant to litigation was most troubling, Professors White and Brussack nevertheless argued that such evidence should cut off backpay from the date of discovery, reasoning,

Anyone who contemplates bringing an employment discrimination action must weigh the risk that the defendant will uncover, in preparing for trial, information about the plaintiff that triggers a discharge policy. There is nothing inherently illegitimate about an employer's acquisition of such information through pretrial discovery or through its own pretrial investigation.<sup>320</sup>

Another approach receiving some support was that adopted by the Third Circuit in *Mardell* and the Eleventh Circuit in *Wallace*. Under that approach, backpay would be cut off before the date of judgment only if the employer could prove that it would have discovered the evidence independently of its discriminatory acts and the resulting litigation, and that it would have taken the same action against the employee at that time.<sup>321</sup> Although this approach also enjoyed support among some commentators,<sup>322</sup> even its advocates shied away, more or less, from requiring reinstatement.

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<sup>318</sup> See, e.g., Davis, *supra* note 19, at 399 (favoring date-of-discovery approach to limiting backpay and denying reinstatement); White & Brussack, *supra* note 312, at 80-91 (advocating severance of backpay from date of discovery and denial of reinstatement at remedial stage of trial if employer can establish that it would have terminated employee on basis of after-acquired evidence); Mills, *supra* note 19, at 1551-55 (advocating position of EEOC Guidelines).

<sup>319</sup> Davis, *supra* note 19, at 399; White & Brussack, *supra* note 312, at 84; Mills, *supra* note 19, at 1552-53.

<sup>320</sup> White & Brussack, *supra* note 312, at 84.

<sup>321</sup> *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1240 (3d Cir. 1994), *cert. granted and judgment vacated*, 115 S. Ct. 1397 (1995); *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1182 (11th Cir. 1992), *reh'g en banc granted and opinion vacated*, 32 F.3d 1489 (11th Cir. 1994).

<sup>322</sup> E.g., McGinley, *supra* note 312, at 197; Sprang, *supra* note 19, at 157; Zemelman, *supra* note 20, at 207-11.

ment or front pay, based on the following rationale articulated by the Eleventh Circuit in *Wallace*:

[A]ssuming that the after-acquired evidence in and of itself would have caused [the employer] to discharge [the plaintiff], it would be inappropriate for a court to order reinstatement or front pay . . . . In other words, if [the employer] now has a legitimate motive that would cause [the plaintiff's] discharge, then reinstatement or front pay would go beyond making [the plaintiff] whole and would unduly trammel [the employer's] freedom to lawfully discharge employees.<sup>323</sup>

Every commentator and court rejecting *Summers* while proposing limitations on employee remedies had one thing in common: they could not shake free of the grasp of employment at will so evident in the foregoing quotations from Professors White and Brunsack<sup>324</sup> and from the Eleventh Circuit.<sup>325</sup> Proponents developed such treatments of after-acquired evidence in an effort to effect the compensation and deterrence objectives of federal employment discrimination law, but did so haltingly, ever fearful that they would trespass upon the forbidden territory of the employer's traditional prerogatives. The Eleventh Circuit's approach in *Wallace* was the most complete rejection of after-acquired evidence in an effort to remedy discrimination. Yet even that approach gave employers the opportunity to use after-acquired evidence to limit backpay, and it rejected altogether reinstatement and front pay as appropriate remedies. The proponents of the *Wallace* position should instead have advocated reinstatement as a proper remedy if an employer could not establish that it would have discovered the

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<sup>323</sup> *Wallace*, 968 F.2d at 1181-82; see also *Mardell*, 31 F.3d at 1240 ("[W]here an equitable remedy, such as reinstatement, would be particularly invasive of the employer's 'traditional management prerogatives,' the after-acquired evidence may bar that remedy."); McGinley, *supra* note 312, at 197 (stating even when employers cannot prove they would have discovered information independently, courts should refuse to reinstate employee); Zemelman, *supra* note 20, at 207 (concluding reasoning in *Wallace* is accurate and persuasive).

<sup>324</sup> See *supra* note 320 and accompanying text.

<sup>325</sup> See *supra* note 323 and accompanying text.



information independently. Moreover, as White and Brussack recognize, if reinstatement is not available, then neither should full backpay be available because the purpose of backpay is to make the plaintiff whole for the period between the adverse employment action and the time of reinstatement.<sup>326</sup>

iii. *A Modest Proposal: Full Recovery.* Prior to *McKennon*, I argued that neither the date-of-discovery approach nor the *Wallace* approach was the appropriate treatment of after-acquired evidence.<sup>327</sup> Instead, I argued, after-acquired evidence should be considered irrelevant and inadmissible in actions brought under federal employment discrimination law, with the sole exception being cases in which the employer could prove that reinstatement would create a substantial risk to its business, other employees, the plaintiff, or the public.<sup>328</sup> However, the burden of proving this risk of harm should rest with the employer. I advocated this approach based on the principle that the objectives of the discrimination statutes should be achieved and that the employer's prerogatives should be displaced to the extent necessary to achieve those objectives.

Thus, my proposal would award full backpay and reinstatement under most circumstances. Are full backpay and reinstatement really necessary to accomplish the objectives of employment discrimination law? The Supreme Court fully addressed the importance of the backpay remedy in *Albemarle Paper Co. v. Moody*.<sup>329</sup> In *Albemarle Paper Co.*, the Court first explained that backpay deters discriminatory conduct by " 'provid[ing] the spur or catalyst which causes employers . . . to self-examine and to self-

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<sup>326</sup> White & Brussack, *supra* note 312, at 84; *accord* Mills, *supra* note 19, at 1552-53.

<sup>327</sup> This argument was included in my presentation before the Tenth Annual National Conference on Labor and Employment Law, identified *supra* note \*.

<sup>328</sup> Cf. *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1238 n.31 (3d Cir. 1994) (recognizing need for such exception at remedies stage of trial to avoid reinstatement if general rule existed that otherwise excluded "tainted" after-acquired evidence obtained through retaliatory investigations by employers), *cert. granted and judgment vacated*, 115 S. Ct. 1397 (1995); McGinley, *supra* note 312, at 197 (stating courts should deny reinstatement, even when employer cannot prove it would have discovered information independently, if employer proves reinstatement would cause it "serious harm"); Sprang, *supra* note 19, at 156-57 (arguing against reinstatement when employer or public is exposed to possibility of substantial harm).

<sup>329</sup> 422 U.S. 405 (1975).

evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' ”<sup>330</sup> The Court explained that backpay is relevant to the compensation objective because, like all make-whole compensation, it attempts to put the plaintiff in the same position she would have been in but for the discriminatory conduct.<sup>331</sup> The Court then cautioned that a backpay award should not be denied unless the reasons for denial, “if applied generally,” would not frustrate the dual objectives of the employment discrimination statutes.<sup>332</sup>

In light of the Court's conclusions on backpay, those who would allow after-acquired evidence to cut off that remedy prior to judgment bear the burden of demonstrating how doing so avoids frustrating the objectives of discrimination law. The date-of-discovery proponents argued that allowing full backpay would overcompensate plaintiffs by placing them in a better position than they would have been absent the discrimination.<sup>333</sup> This proposition is wrong for several reasons. First, it fails to recognize that, in most cases, the employer would not have discovered the after-acquired evidence absent its illegal acts and the ensuing litigation.<sup>334</sup> Moreover, the date-of-discovery approach does not require the employer to prove that it would have discovered the after-acquired evidence independently.

Second, the overcompensation argument assumes the only injury being redressed is the plaintiff's job loss (or similar results of the employer's adverse action). The argument fails to recognize the plaintiff's psychological injury from being treated as “less than

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<sup>330</sup> *Id.* at 417-18 (quoting *United States v. N. L. Indus.*, 479 F.2d 354, 379 (8th Cir. 1973)).

<sup>331</sup> *Id.* at 418-21.

<sup>332</sup> *Id.* at 421.

<sup>333</sup> *E.g.*, *White & Brussack*, *supra* note 312, at 82; *Mills*, *supra* note 19, at 1547-48.

<sup>334</sup> *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1239 (3d Cir. 1994), *cert. granted and judgment vacated*, 115 S. Ct. 1397 (1995). The Third Circuit stated the following in *Mardell*:

Insofar as after-acquired evidence is uncovered during the legal dispute and would not have been discovered, at least for an indeterminate stretch of time, absent the employer's unlawful acts, the plaintiff would be left in a worse position because of the discrimination if the court were to make use of that evidence to limit the victim's remedies, and the make-whole compensatory goal of the acts would not be reached.

*Id.*

human"—being subjugated because of his race, color, sex, nationality, age, disability, or religion.<sup>335</sup>

Third, the argument that full backpay might overcompensate a victim of discrimination is unduly emphasized by those who refuse to interfere with managerial prerogatives to achieve the goals of discrimination law. Compensation is neither the only objective of the employment discrimination statutes nor the most important. Even if a full backpay award resulted in overcompensation, that result would be more consistent with the broader goal of eradicating discrimination in the workplace.<sup>336</sup>

Finally, any approach that cuts off backpay before judgment would interfere with the deterrence objective of the statutes. Prior to *McKennon*, attorneys and consultants advising clients on the after-acquired evidence doctrine advised employers to take full advantage of the *Summers* remedy-preclusion approach by creating opportunities for employees to make misrepresentations on employment documents, by routinely searching for such misrepresentations, and by establishing a low threshold for discharge.<sup>337</sup> This advice will not change now that after-acquired evidence can be used only to reduce significantly a plaintiff's remedies rather than to bar them altogether.<sup>338</sup>

The rationales in favor of awarding full backpay also militate in

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<sup>335</sup> Weber, *supra* note 168, at 534; see also *Mardell*, 31 F.3d at 1232 (describing "dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw").

Such injuries arguably will be compensated now that the Civil Rights Act of 1991 provides for compensatory damages, see *supra* note 296 (discussing compensatory damages provision of Act), and thus backpay need not be used in such a manner. Because the plaintiff's claim in *McKennon* was under the ADEA, under which compensatory and punitive damages were (and still are) unavailable, the Supreme Court did not address the effect of after-acquired evidence on such damages. In Enforcement Guidance issued after *McKennon*, the EEOC takes the position that only "out-of-pocket losses, analogous to backpay" should be cut off as of the date of discovery. EEOC: GUIDANCE ON AFTER-ACQUIRED EVIDENCE, reprinted in 405 Lab. Rel. Rep. (BNA) 7331, 7335 (Dec. 14, 1995). In contrast, compensatory damages for emotional harm should not be limited to the date of discovery. *Id.* at 7336. Furthermore, the EEOC takes the position that after-acquired evidence bars neither liquidated damages under the ADEA or the Equal Pay Act nor punitive damages. *Id.* at 7336-37.

<sup>336</sup> Weber, *supra* note 168, at 530-31.

<sup>337</sup> *Mardell*, 31 F.3d at 1236 n.26; see also *Wallace v. Dunn Constr. Corp.*, 968 F.2d 1174, 1180 (11th Cir. 1992) (explaining *Summers* rule "invites employers to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination"), *reh'g en banc granted and opinion vacated*, 32 F.3d 1489 (11th Cir. 1994).

<sup>338</sup> *Mardell*, 31 F.3d at 1236-37, 1239; see also *infra* notes 378-395 and accompanying text (discussing issue further).

favor of awarding reinstatement.<sup>339</sup> Reinstatement as an employment discrimination remedy relates to both of the objectives of employment discrimination law.<sup>340</sup> To award something less or something different is to undercompensate and underdeter. Commentators on the subject of make-whole relief have identified several important consequences of denying reinstatement.<sup>341</sup> First, employees who are dismissed for discriminatory reasons are stigmatized by their dismissals and are likely to take longer obtaining other jobs than are employees who are laid off for economic reasons.<sup>342</sup> Thus, even if front pay is provided in lieu of reinstatement, that award is not necessarily an adequate substitute for the plaintiff's former job.<sup>343</sup> Second, if employees discharged for discriminatory reasons cannot be reinstated, employers will understand that they can discriminate and rid themselves of unwanted employees for a relatively low price. Thus, the deterrent impact of discrimination lawsuits is significantly decreased.<sup>344</sup> Finally, if victims of discrimination are not reinstated, the message to other employees becomes clear: they can lose their jobs, too, notwithstanding their federally protected rights, and they must be careful about asserting these rights.<sup>345</sup> Thus, the number of "private attorneys general" decreases and, as a result, the deterrent effect of federal employment discrimination law diminishes.

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<sup>339</sup> Corbett, *supra* note \*, at 215-18; *see also* Parker, *supra* note 120, at 436-37 (explaining that Eleventh Circuit in *Wallace* failed to recognize that denying reinstatement or front pay would leave plaintiffs in worse position than they would have been absent discrimination, despite recognizing this point regarding backpay). Even date-of-discovery proponents used this point to criticize supporters of the *Wallace* approach, asserting they failed to remain consistent with the underlying premise of their argument for full backpay. *See, e.g.*, Mills, *supra* note 19, at 1548 ("[I]f cutting off back pay at the point of discovery grants a windfall to employers, why was it not a windfall to the employer in *Wallace* to avoid front pay, reinstatement, and injunctive relief based upon the after-acquired evidence?").

<sup>340</sup> Weber, *supra* note 168, at 530-32.

<sup>341</sup> Benjamin W. Wolkinson & Victor W. Nichol, *The Illusion of Make-Whole Relief: The Exclusion of the Reinstatement Remedy in Hostility-Based Discrimination Cases*, 8 LAB. LAW. 157, 168-71 (1992).

<sup>342</sup> *Id.* at 169.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 170.

<sup>345</sup> *Id.* at 171 ("Reinstatement is not only a remedy for the particular employee discharged, but is also an attempt to lessen the effects of the discharge on the remaining employees.").

While arguing that reinstatement should not be generally prohibited in after-acquired evidence cases, I recognize that reinstatement does not always accomplish the objective of returning a plaintiff to long-term employment with the same employer. Empirical evaluations of reinstatement under the National Labor Relations Act indicate that most plaintiffs offered reinstatement refuse to return, and most of those who accept reinstatement remain on the job for less than two years.<sup>346</sup> That fact notwithstanding, reinstatement is an important remedy that should not be barred. It may be that most discrimination victims holding judgments entitling them to reinstatement would settle with employers by "trading in" their reinstatement right for more money.<sup>347</sup> Even so, the choice rightly remains in the hands of the victim. In litigating employment discrimination cases, I encountered cases in which the plaintiffs would not trade reinstatement for money because they needed the job. Moreover, I also encountered employers who were far more upset by being required to reinstate a discrimination victim than by any monetary award. The attitude of such employers—that they should be entitled to discriminate for a price—is the very reason why reinstatement is an irreplaceable remedy for violations of federal employment discrimination law. In the words of the Court in *Albemarle Paper Co.*, such employers need to see the reinstated employee back on the job to spur them "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."<sup>348</sup>

My proposal for treating after-acquired evidence is like that of Professor Mark Weber, who proposed that courts should award full

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<sup>346</sup> Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 28-32. Although Professor West concludes that reinstatement is not an effective make-whole remedy, she recognizes two unique advantages of the remedy. First, even if the reinstated employee remains on the job for only a short time, the reinstatement itself may remove the stigma of discharge, thus making it easier for the employee to find another job. Second, no matter how long it lasts, reinstatement sends a message to the employer that it did not "get away with" discrimination. *Id.* at 40.

<sup>347</sup> Weber, *supra* note 168, at 537 n.319.

<sup>348</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *United States v. N. L. Indus.*, 479 F.2d 354, 379 (8th Cir. 1973)).

recovery to plaintiffs in mixed-motives cases.<sup>349</sup> Weber argued that such relief is appropriate because it “advances the remedial goals of compensation, deterrence, and vindication of the community sense of justice, and satisfies the terms and policies of Title VII.”<sup>350</sup> Moreover, he argued, alternative approaches to remedies in mixed-motives cases permit “management prerogatives [to] trump the civil rights of minorities and women.”<sup>351</sup>

In opposing such an approach to after-acquired evidence, Professors White and Brussack point out that Congress rejected Weber’s full-recovery approach to mixed-motives cases in the Civil Rights Act of 1991.<sup>352</sup> In response to White and Brussack, two points are in order. First, Congress’s rejection of Weber’s approach does not mean that it is not the better approach. Second, as both *McKennon* and White and Brussack’s article recognize, after-acquired evidence cases are not analogous to mixed-motives cases: the established discriminatory act based on discriminatory motive alone in after-acquired evidence cases makes the argument for full relief stronger in such cases than in mixed-motives cases.

For all my protestations that after-acquired evidence should not affect either liability or remedies, the Supreme Court in *McKennon* adopted the date-of-discovery treatment. Short of adopting *Summers*’s remedy preclusion rule, a result that would have been astounding even for a Court undervaluing employment discrimination law, the Court could not have adopted a more pro-employer approach than date-of-discovery. Thus, the *McKennon* decision is a resounding subordination of employment discrimination law to employment at will.

b. *Same Old Story: Employment at Will Wins.* The fall of *Summers* is much exaggerated. Although the Court rejected the preclusion of remedies based on after-acquired evidence, it nonethe-

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<sup>349</sup> Weber, *supra* note 168, at 538.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 539.

<sup>352</sup> White & Brussack, *supra* note 312, at 82. In the 1991 Act, Congress provided that in mixed-motives cases in which employers would have taken the same adverse employment action absent the discriminatory motive, courts may grant declaratory relief, some injunctive relief, and attorney’s fees and costs, but they are prohibited from awarding damages or ordering reinstatement, hiring, promotion, or other payment. 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. V 1993).

less adopted an approach that will result in victims of discrimination recovering very little. The dissent in *Wallace* thought it strange that the majority rejected *Summers* as an "affirmative defense," but then accepted it as a limitation on relief.<sup>353</sup> Indeed, what the Supreme Court did in *McKennon* was kick *Summers* out the front door in the first part of the opinion and then, in the second part of the opinion, let it in the back door.<sup>354</sup>

It would be difficult to find a Supreme Court opinion that more concisely and cogently states the purposes of federal employment discrimination law than the first part of the *McKennon* analysis.<sup>355</sup> After stating the law's overall goal of eradicating discrimination and its dual objectives of deterrence and compensation, the Court declared the important role of private litigants in furthering these objectives.<sup>356</sup> Indeed, the Court recognized that the "efficacy of its enforcement mechanisms becomes one measure of the success of the [ADEA]."<sup>357</sup> With that prelude, the Court rejected *Summers*.<sup>358</sup>

Despite having extolled the virtues of discrimination law in the first part of its analysis, the Court then elevated employment at will above that law in the second part. One would have to go back to *Price Waterhouse*<sup>359</sup> to find a more explicit statement that, in the balance between discrimination victims' statutory rights and employers' common-law prerogatives, employers' rights win. The second part of the opinion is chock-full of the minions of employment at will: "legitimate interests of the employer," "employer's legitimate concerns," "significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees," "employers' freedom of choice," "lawful prerogatives of

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<sup>353</sup> *Wallace v. Dunn Constr. Corp.*, 968 F.2d 1174, 1188 (11th Cir. 1992) (Godbold, J., dissenting), *reh'g en banc granted and opinion vacated*, 32 F.3d 1489 (11th Cir. 1994).

<sup>354</sup> Similarly, the Court explained that the unclean hands defense does not apply to bar recovery where, as in employment discrimination actions, important public policies are served by the lawsuit. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885 (1995). However, the Court immediately discussed allowing the plaintiff's wrongful act to reduce the remedy available. *Id.* at 886.

<sup>355</sup> *Id.* at 884-85.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 885.

<sup>358</sup> *Id.*

<sup>359</sup> See *supra* notes 160-168 and accompanying text (discussing *Price Waterhouse*).

the employer,” and “employer’s rights and prerogatives.”<sup>360</sup> The Court, implicitly explaining the wide ambit it is recognizing for employment at will, explained that the ADEA and Title VII are not a “general regulation of the workplace.”<sup>361</sup>

After utilizing employer prerogatives to rout the discrimination statutes, the Court adopted the date-of-discovery approach to after-acquired evidence, proclaiming that “we *cannot* require the employer to ignore the information even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit.”<sup>362</sup> The Court has done this before—declared that it is powerless to prevent the subordination of the employment discrimination statutes to employment at will.<sup>363</sup> The question remains the same as it was in response to the Court’s declarations of incompetence and impotence in *Furnco* and *Hicks*: Is the correct language “cannot” or “will not”?

Theoretically, the *McKennon* Court’s elevation of employment at will over discrimination law is perhaps more troubling than in any of the prior cases. At least in *Furnco*, *Hicks*, and the others, the Court exalted employers’ prerogatives when the plaintiffs had not proven discrimination (although I realize the Court used the employers’ prerogative principles to conclude that the plaintiffs had not proven discrimination). In *McKennon*, the employer, for the purposes of its motion for summary judgment based on after-acquired evidence, conceded that it had discriminated.<sup>364</sup> Thus, *McKennon* differed from its predecessors in that no issue existed as to whether the employer discriminated in violation of federal law. Nevertheless, the Court concluded that, notwithstanding the admitted violation of the employment discrimination laws, it must conduct a balancing of the victim’s statutory rights with the employer’s rights in order to avoid trammeling the employer’s rights.<sup>365</sup>

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<sup>360</sup> *McKennon*, 115 S. Ct. at 886. Note that all of this language fits into one page in the reporter.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* (emphasis added).

<sup>363</sup> See *supra* notes 141-146, 243-244 and accompanying text (discussing Court’s general reluctance in *Furnco* and *Hicks*, respectively, to put limits on employment at will).

<sup>364</sup> *McKennon*, 115 S. Ct. at 883.

<sup>365</sup> *Id.* at 886.



One might think that when there is an admitted statutory violation, the Court would be more concerned with giving effect to the objectives of the statutes and less concerned with trespassing upon the sacred ground of employers' common-law rights. Employment at will triumphs, however, even when discriminatory violations are admitted. The Court rushed to preserve the employer's rights before ensuring that an admitted violation of employment discrimination law was effectively remedied.

Moreover, *McKennon* is worse than many of the Court's prior decisions because it was a unanimous opinion. *Hicks*, in contrast, was a five-four decision. It is troubling that not one justice expressed a dissent concerning the limitation the Court was imposing on a plaintiff's remedies.<sup>366</sup>

*McKennon* also presents an interesting contrast to *Hicks*. In *Hicks*, the majority and dissent disagreed about whether a defendant employer whose articulated reasons for its adverse actions are found to be pretextual is a liar, and if so, whether that should result in judgment for the plaintiff.<sup>367</sup> Justice Scalia, writing for the majority, rejected the idea that such an employer is necessarily a liar. Even if one concludes the employer is a liar, the majority argued, Title VII is not a statute designed to punish perjury.<sup>368</sup> As the Court suggested, employment at will renders the Court powerless to impose liability on lying employers.<sup>369</sup>

Moreover, the *Hicks* majority contended that the dissent's judgment-for-lying scheme was not symmetrical because plaintiffs could lie about everything without jeopardizing a judgment to which they were otherwise entitled.<sup>370</sup> Yet, in after-acquired evidence cases, where the lying or dishonest party is the employ-

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<sup>366</sup> See Sullivan & Harrick, *supra* note 19, at 291 ("It is surprising that this view was adopted without a single dissent, since there were compelling arguments against this position as well as forebodings of abuse.").

<sup>367</sup> See *supra* notes 249-254 and accompanying text (discussing majority and dissenting opinions in *Hicks* concerning lying employers).

<sup>368</sup> *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2754 (1993).

<sup>369</sup> See *supra* note 239 and accompanying text (discussing Court's unwillingness in *Hicks* to impose liability based on employer's prevarication).

<sup>370</sup> *Hicks*, 113 S. Ct. at 2754.

ee,<sup>371</sup> the Court unanimously responds by imposing a substantial limitation on the available remedies. If symmetrical treatment were still important, as the majority suggested in *Hicks*, the plaintiff should not be punished for dishonesty in the context of her employment discrimination action.

Moreover, the dishonesty in after-acquired evidence cases is not perjury in a court of law or in an administrative proceeding, for which the Court expressed such disdain in *ABF Freight*.<sup>372</sup> In sum, given the *Hicks* Court's tolerance of "liars," who were shielded from the imposition of liability by employment at will, one would have thought that dishonest employees would have been given greater protection by the employment discrimination laws and policies to prevent a ravaging of their remedies. The difference may be that the Court values employment at will enough to tolerate dishonest employers, but does not value the discrimination laws enough to tolerate dishonest employees.

A final point of concern regarding *McKennon* is the increasing privatization of employment discrimination law. A pre-*McKennon* commentator explained that the evolution among judges, legislators, and others in their views on the purpose of Title VII, from a statute addressing important public policy concerns to a statute providing remedies for personal injury claims between private parties,<sup>373</sup> made the *Summers* rule a palatable approach to after-acquired evidence.<sup>374</sup> The Court's opinion in *McKennon* demonstrates this changing view. The Court discussed the unclean hands defense and said that it had formerly rejected application of that

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<sup>371</sup> Indeed, the most common after-acquired evidence cases are those involving lies, such as resume or application fraud. See *infra* notes 378-379 and accompanying text (noting common occurrence of "puffing" in job applications). Even cases, such as *McKennon*, that involve wrongful conduct other than misrepresentations, still involve dishonesty.

<sup>372</sup> See *supra* notes 255-271 and accompanying text (discussing *ABF Freight* fully).

<sup>373</sup> At least one reason for this evolution is that the vast majority of employment discrimination actions now involve discharges. Prior to 1977, more actions involved refusals to hire. Donohue & Siegelman, *supra* note 7, at 1016 fig.7. Furthermore, the shift has been dramatic: whereas failure-to-hire EEOC charges outnumbered unlawful termination charges by 50% in 1966, unlawful discharge claims outnumbered failure-to-hire claims by more than 600% in 1985. *Id.* at 1015. Thus, many have come to believe that discrimination actions no longer serve the original purpose of opening job markets to discrimination victims who had been excluded. *Id.* at 1033. Instead, the discrimination laws have become statutory wrongful discharge laws. *Id.*

<sup>374</sup> Zemelman, *supra* note 20, at 193-97.

defense " 'where a private suit serves important public purposes.' " <sup>375</sup> Then, in the next sentence, the Court stated that the foregoing proposition does not mean that the employee's misconduct is irrelevant to the remedies available. <sup>376</sup>

The Court seems to be saying that it thinks there is nothing wrong with deemphasizing the compensation objective (which is directed more toward private purposes) when the plaintiff has engaged in wrongful conduct. What the Court fails to recognize or address, however, is the substantial effect that such a limitation also has on the deterrence objective <sup>377</sup> (which is directed more toward the public policies of the law). The Court's decision in *McKennon* is not only a product of a belief that employment discrimination law provides relief in essentially private disputes, but it is also a portent of the continuing, and perhaps escalating, privatization of discrimination law. The Court's willingness to allow after-acquired evidence to strip away most of the plaintiff's equitable remedies projects its view that employment discrimination law is like any other private law. Bereft of its public policy banner, employment discrimination law becomes little more than a statutory-tort exception to employment at will. As such, it probably will become even more susceptible to employment at will's onslaught.

A more serious concern than the theoretical one discussed above is that *McKennon* makes circumvention of federal employment discrimination law both possible and advisable on the practical level of day-to-day business operations. After-acquired evidence cases are not rare cases. Although *McKennon* involved post-hiring wrongful employee conduct, most after-acquired evidence cases involve resume or application fraud, in which applicants for jobs engage in "puffing" of education credentials or work experience to enhance their chances of employment. <sup>378</sup> Such conduct is wide-

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<sup>375</sup> *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885 (1995) (quoting *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968)).

<sup>376</sup> *Id.* at 886.

<sup>377</sup> See *infra* notes 378-388 and accompanying text (highlighting undermining effect of *McKennon* on deterrence objective of discrimination laws).

<sup>378</sup> White & Brunsack, *supra* note 312, at 53 & n.13.

spread.<sup>379</sup> While the prevalence of such conduct does not excuse it, the effect it has on discrimination claims will produce a significant impact on the overall enforcement of employment discrimination law.<sup>380</sup>

The Third Circuit in *Mardell* reviewed the advice given to employers seeking to take advantage of the *Summers* approach to after-acquired evidence.<sup>381</sup> Among that advice: (1) Include on applications and other employment documents an express statement that misrepresentations can result in discharge; (2) When an employee or former employee sues for employment discrimination, immediately conduct a thorough investigation to determine whether there are misrepresentations or other misconduct that can be used in defense of the suit; and (3) Routinely search for pre-employment misrepresentations.<sup>382</sup> One commentator added that employers should uniformly apply their policies and, during pre-trial discovery, should depose the plaintiff about his application and other personnel documents "line-by-line" to uncover any misrepresentations.<sup>383</sup>

Predictably, given the prevalence of misrepresentations, such exploitation of after-acquired evidence will result in underenforcement of the discrimination laws and thereby underdeter discrimination in employment practices.<sup>384</sup> Not enough blameless employees exist to serve the role of "private attorneys general." The Third Circuit predicted in *Mardell* that even if *Summers* were rejected in favor of the date-of-discovery approach, employers would still be

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<sup>379</sup> *Id.*; see also *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1236 n.28 (3d Cir. 1994) (citing law review articles supporting proposition that "resume fraud is a serious and recurrent problem facing employers"), *cert. granted and judgment vacated*, 115 S. Ct. 1397 (1995); Rubinstein, *supra* note 312, at 1 n.2 (noting survey finding 10% of firms experience application fraud).

<sup>380</sup> *Mardell*, 31 F.3d at 1236-37.

<sup>381</sup> *Id.* at 1236 n.26.

<sup>382</sup> *Id.* This advice can still be implemented by employers, although they must be careful to avoid the appearance of retaliatory investigations. The EEOC takes the position that such investigations nullify the date-of-discovery cutoff on backpay and justify imposition of punitive damages. EEOC: GUIDANCE ON AFTER-ACQUIRED EVIDENCE, *supra* note 335, at 7334-36.

<sup>383</sup> William S. Waldo & Rosemary A. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered After an Employee's Discharge to Bar Discrimination Claims*, 9 LAB. LAW. 31, 41-42 (1993).

<sup>384</sup> *Mardell*, 31 F.3d at 1236-37.

given the same advice and the deterrence objective of the laws would still be frustrated to some extent.<sup>385</sup> Has that prediction proven true? Of course it has. Employers are as likely to receive, and heed, such advice when the result is a significant reduction in their liability as when the result is an avoidance of all liability. For example, one recent publication advised that, in conducting aggressive discovery and in assessing a plaintiff's damage claims in a sexual harassment suit, "[a]ll information included on [the] plaintiff's employment application [is] still relevant to front and back pay claims after *McKennon*."<sup>386</sup>

The effect of employers' exploitation of after-acquired evidence under the *McKennon* rule probably will not be confined to limiting the recovery of employees whose claims are resolved at trial. Rather, as with *Hicks*, victims of discrimination will sue less often, and those who sue and settle will do so for less.<sup>387</sup> An employer is likely to advise current and former employees contemplating suit that misrepresentation or other misconduct will substantially limit any recovery. This preemptive strike will more likely dissuade potential plaintiffs from suing, or persuade plaintiffs to settle early and for less, than will an explanation of the employer-friendly interpretation of the *McDonnell Douglas* analysis under *Hicks*. While potential or actual plaintiffs may not understand an explanation of *Hicks*, there is some visceral "punch" to the "you had it coming"<sup>388</sup> rationale of *McKennon*. Feeling ashamed of their misconduct, or perhaps embarrassed at being "caught," former employees may give up their claims with a whimper, accepting de

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<sup>385</sup> *Id.* at 1236-38.

<sup>386</sup> Hope B. Eastman, *A Look at Damages from the Perspective of the Defense Bar*, in *SEXUAL HARASSMENT LITIGATION* 239 (P.L.I. Litig. & Admin. Practice Course Handbook Series No. 520, 1995).

<sup>387</sup> See *supra* note 245 and accompanying text (predicting as effect of *Hicks* fewer suits and lower settlements). Perhaps the difference is that those who do sue will be less likely to lose their cases unless the court conducts the trial such that the after-acquired evidence taints the factfinder's consideration of the liability issue. After the *Mardell* judgment was vacated to be reconsidered in light of *McKennon*, the Third Circuit declined to instruct the trial court on how to conduct the trial on remand. The court stated, "While bifurcation may sometimes be advisable as a vehicle to insure that after-acquired evidence not be improperly used during the liability phase, in other cases cautionary instructions or stipulations may render it unnecessary." *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 n.2 (3d Cir. 1995).

<sup>388</sup> *Mardell*, 31 F.3d at 1232.

minimis settlement offers, or they may forego their claims altogether. Thus, the likely effect of the *McKennon* approach on the workplace is both undercompensation of discrimination victims and underdeterrence of discriminatory practices. Employers, armed with the weaponry *McKennon* places at their disposal, are able to operate not wholly under the freedom of employment at will, but close to it.

Fortunately, *McKennon* does provide one brake on these projected results. *McKennon* may be read as authorizing lower courts to examine the objective reasonableness of an employer's asserted reasons for discharge. The Court stated that "[w]here an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge."<sup>389</sup> It seems unlikely that the Court meant to authorize courts to second-guess employer decisions on the ground that the conduct was insufficiently egregious to justify the adverse action. That interpretation would be contrary to the Court's admonition in *Furnco* that courts are incompetent to devise less discriminatory practices for employers.<sup>390</sup>

More likely, that statement meant that a court may inquire into whether employers have consistently applied their stated practices,<sup>391</sup> regardless of whether those practices are objectively reasonable. This interpretation, rather than that permitting an examination of objective reasonableness, is further supported by the Court's realization that it needed to address the prospect of routine employer undertakings of extensive discovery into a plaintiff's background or performance. Unfortunately, the Court's resolution of that problem is hardly reassuring. In one sentence, the Court explained that a court's authorization to award attorney's fees by statute and to impose sanctions under Rule 11 in appropriate cases

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<sup>389</sup> *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 886-87 (1995).

<sup>390</sup> See *supra* notes 136-149 and accompanying text (discussing *Furnco*'s admonition that courts not second-guess employers).

<sup>391</sup> *Sullivan & Harrick, supra* note 19, at 291. On remand of *Mardell*, the Third Circuit refused to "opine on plaintiff's contentions as to the type or quantum of evidence (such as a policy or custom) that [the defendant] must adduce to establish that it would in fact have fired her upon discovering her resume fraud." *Mardell*, 65 F.3d at 1073 n.3.

"will deter most abuses."<sup>392</sup> How will those putative safeguards deter most abuses? The threat of an award of attorney's fees is hardly new, and will play little or no role when employers intimidate potential plaintiffs into early settlements or into not suing at all. As for Rule 11 sanctions, the Court's statement is enigmatic: How can discovery directed at information the Court has deemed relevant to the limitation of remedies be subject to sanctions?<sup>393</sup> In short, the Court's half-hearted attempt to address the "not . . . insubstantial [concern]"<sup>394</sup> regarding employer exploitation of the Court's treatment of after-acquired evidence does not begin to address the practical, day-to-day subordination of federal employment discrimination law.<sup>395</sup>

The *McKennon* Court's less-than-meticulous attention to a significant problem created by its decision is in stark contrast to the plurality's painstaking efforts to allay employers' fears of quota requirements when, in *Watson v. Fort Worth Bank & Trust*,<sup>396</sup> the Court extended disparate impact analysis to subjective employment criteria. To protect employers against quota requirements, the plurality in *Watson* was willing to essentially "dismember" the disparate impact framework. The Court in *McKennon* makes no such herculean efforts to protect victims of discriminatory employment practices from a more realistic threat.

Having traced the subordination of federal employment discrimination law to employment at will from *Furnco* through *McKennon*, I next consider the future of discrimination law.

#### IV. THE FUTURE OF EMPLOYMENT DISCRIMINATION LAW

*Are we willing to expend whatever resources are necessary to put an end to workplace discrimination? Are we fully committed to the elimination of discrimination even at the expense of other legitimate concerns?*<sup>397</sup>

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<sup>392</sup> *McKennon*, 115 S. Ct. at 887.

<sup>393</sup> *Davis*, *supra* note 19, at 404.

<sup>394</sup> *McKennon*, 115 S. Ct. at 887.

<sup>395</sup> *Sullivan & Harrick*, *supra* note 19, at 292.

<sup>396</sup> 487 U.S. 977 (1988); *see also supra* notes 150-159 and accompanying text (analyzing plurality opinion in *Watson*).

<sup>397</sup> *Gregory*, *supra* note 52, at 68.

If the Supreme Court does not take the lead in pronouncing that federal employment discrimination law embodies vital public policy, that law will continue to become less effective and less meaningful. Although in the past, supporters of discrimination law have looked to Congress to overcome unfavorable Court decisions, that will not be an adequate solution for the current state of affairs. In the short term, the current Congress does not appear to be favorably disposed toward federal labor and employment law. Perhaps in the long term, Congress may react to Supreme Court decisions that subordinate discrimination law to employment-at-will principles. Indeed, the Civil Rights Act of 1991 and the bills introduced to overturn *Hicks* are evidence of this.<sup>398</sup> However, *Hicks* and *McKennon* demonstrate that “the Court is inherently more agile than Congress.”<sup>399</sup> As evidenced by the legislative history of both the 1991 Act and its unsuccessful 1990 precursor, Congress cannot respond expeditiously enough to adequately protect the rights of discrimination victims from a multitude of adverse Court decisions.<sup>400</sup> Congress may try in the future, by giving us “the Civil Rights Acts of 1998, 2005, and 2010.”<sup>401</sup> Until the Supreme Court decides and declares, however, that federal employment discrimination law displaces employment at will and employer prerogatives to the extent necessary to achieve the goal of eradicating discrimination in the workplace through compensation and deterrence, there will not be consistent and effective enforcement of that law.<sup>402</sup>

In the meantime, the previously discussed decisions of the Court have not left the lower courts without any choices. For example, in applying *Hicks*, lower federal courts can interpret the Court’s holding narrowly. There is nothing in the *Hicks* opinion that requires courts to impose a pretext-plus standard in deciding a

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<sup>398</sup> See *supra* note 247 and accompanying text (discussing legislation proposed to overturn *Hicks*).

<sup>399</sup> Brookins, *supra* note 69, at 943.

<sup>400</sup> *Id.* at 943-44 (positing Congress “simply cannot respond to each case in a barrage of judicial attacks on its civil rights legislation”).

<sup>401</sup> Culp, *supra* note 107, at 967.

<sup>402</sup> *Cf. id.* at 1010 (“They will not be the last bills or the last decisions by the Court in this area as long as the Court is dominated by a conservative majority intent on rewriting employment discrimination law and committed to avoiding the race question in that effort.”).



defendant's motion for summary judgment. In applying *McKennon*'s general rules regarding the limiting effects of after-acquired evidence, courts may interpret the Court's requirement—that an employer must, in order to use after-acquired evidence, first establish that it would have terminated the employee on those grounds alone—as authorizing courts to scrutinize the employer's assertions carefully and perhaps to evaluate the objective reasonableness of those assertions. Furthermore, *McKennon*'s authorization that courts “can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party”<sup>403</sup> remains to be fleshed out by the lower federal courts.

However, for the lower courts to further eradicate discrimination within the Supreme Court's framework, or for the Court to develop a new vision and a new voice to achieve the purposes of federal discrimination law, judges and justices must re-evaluate their values and determine that it is appropriate, indeed congressionally mandated, that employment at will be displaced to the extent necessary to achieve the goals of employment discrimination law.

Several possibilities explain why judges have decided that employment discrimination law should be subordinated to employment at will. First, some judges simply believe that the common-law rights flowing from property and freedom-of-contract principles are more important and more deserving of legal protection. Second, some judges think it is impossible for the goals of discrimination law to be achieved, because market forces simply cannot be harnessed by that law. Third, many judges see the burgeoning caseload of discrimination claims<sup>404</sup> and conclude that the courts cannot effectively handle such a load. Fourth, considering both the magnitude of the caseload and the types of claims, judges may conclude that many discrimination claims are meritless. Moreover, judges may consider the type of discrimination actions (now far more based on allegedly discriminatory discharge than on refusal to hire<sup>405</sup>) and conclude that discrimination law is no longer

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<sup>403</sup> *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 886 (1995).

<sup>404</sup> See generally Donohue & Siegelman, *supra* note 7 (analyzing growth and changing nature of employment discrimination claims from 1960s to 1980s).

<sup>405</sup> *Id.* at 984.

fulfilling its historic purpose, instead having become a series of wrongful-discharge statutes protecting only persons in specified classes. Finally, some judges may believe that invidious discrimination in the workplace is no longer a significant problem.<sup>406</sup> The judiciary must candidly reconsider the foregoing views in light of the strong public policy manifested in federal employment discrimination law.

Nineteen ninety-four marked the thirtieth anniversary of the oldest of the federal employment discrimination laws. Thirty years hence what will we observe? How many civil-rights restoration acts will there be? What will be the track record of the courts, primarily the Supreme Court, in this area of the law? The answers lie in the resolution of the relationship between the common-law doctrine of employment at will and the federal employment discrimination statutes. At this time, the future does not look promising for federal discrimination law.

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<sup>406</sup> See Gregory, *supra* note 52, at 68 ("The federal judiciary has become increasingly conservative and increasingly sympathetic to institutional concerns. Many judges may feel that too many discrimination suits are brought and that too many lack a substantial evidentiary foundation. Some may even believe that discrimination is no longer a significant societal problem.").